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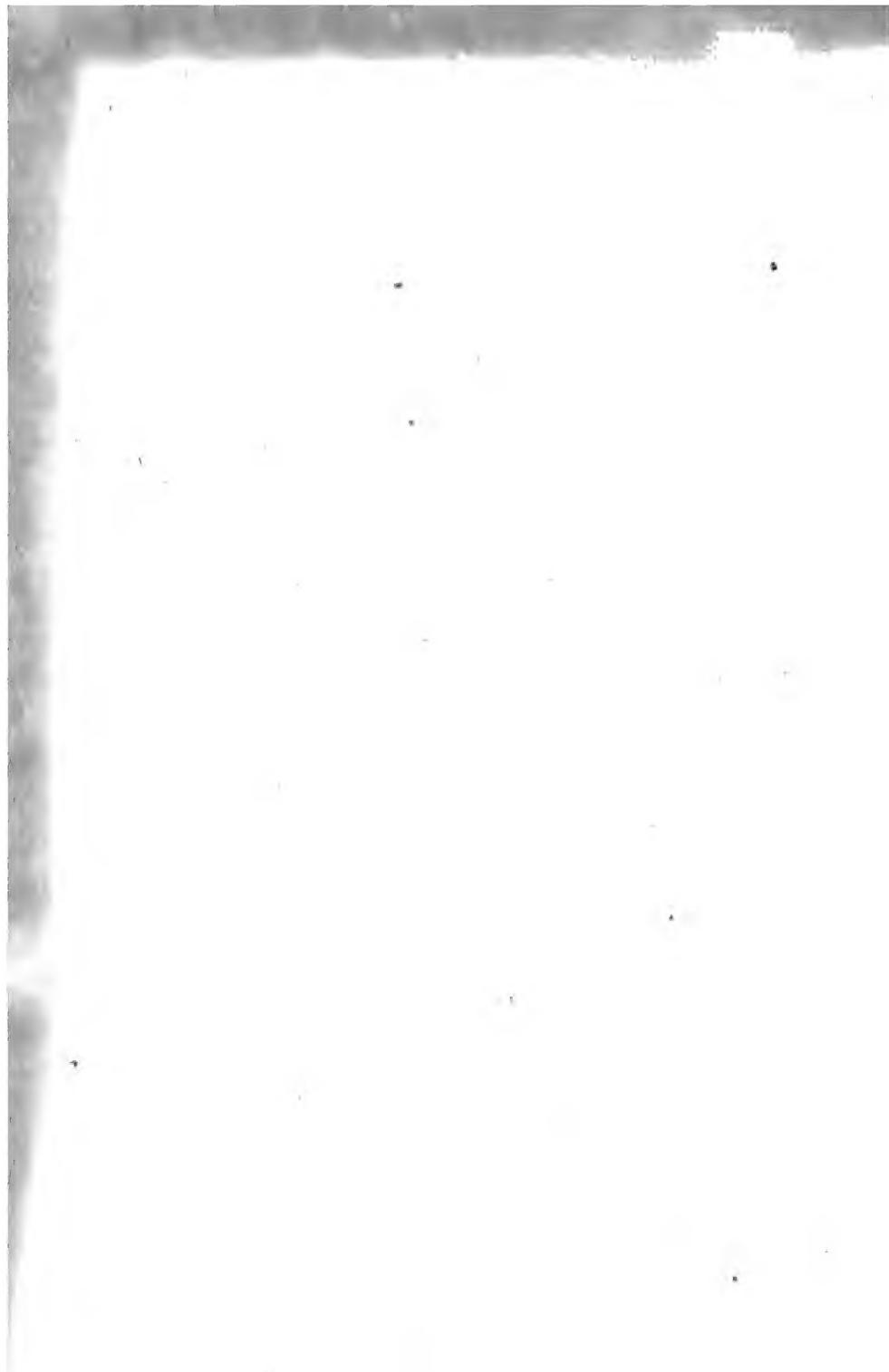
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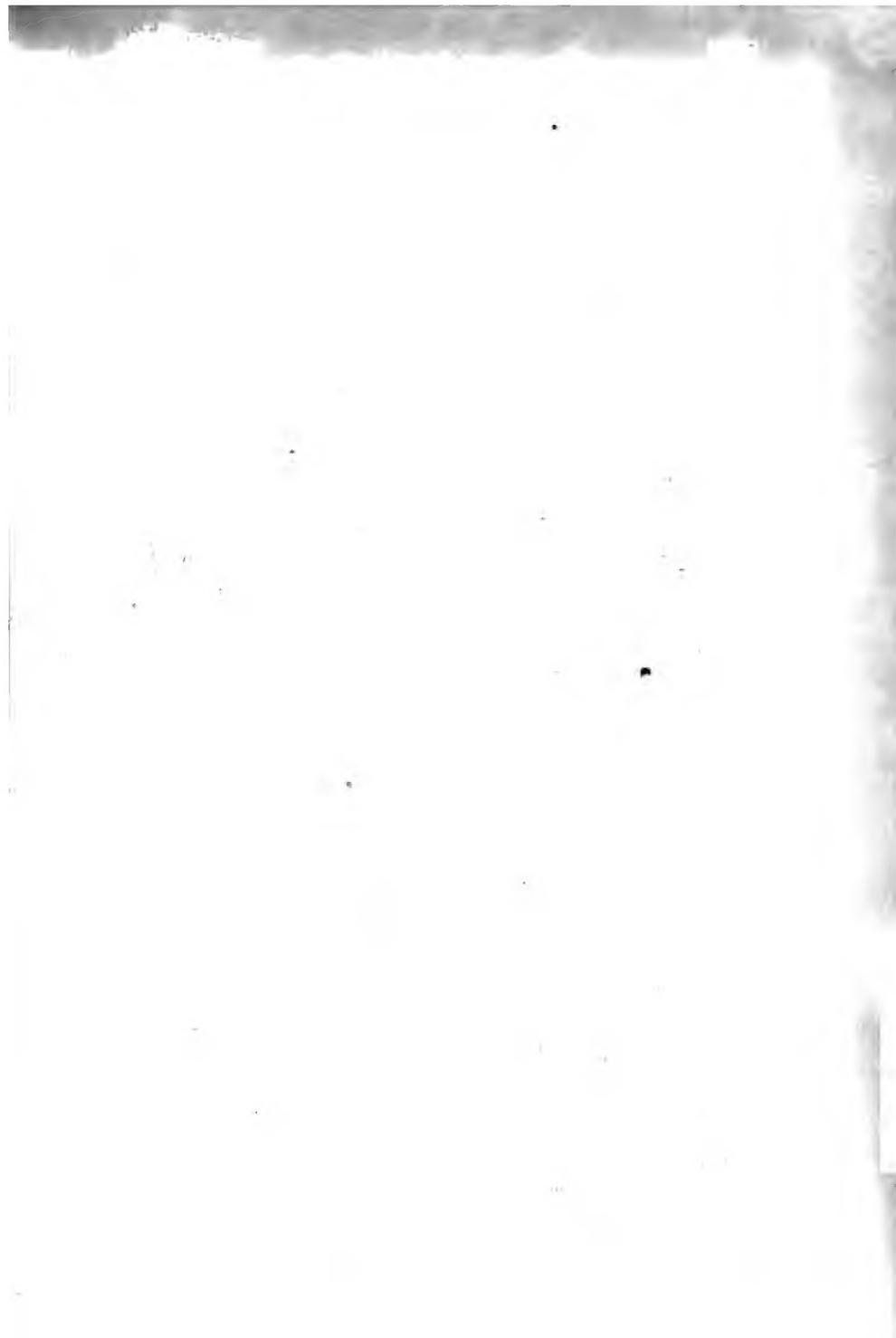
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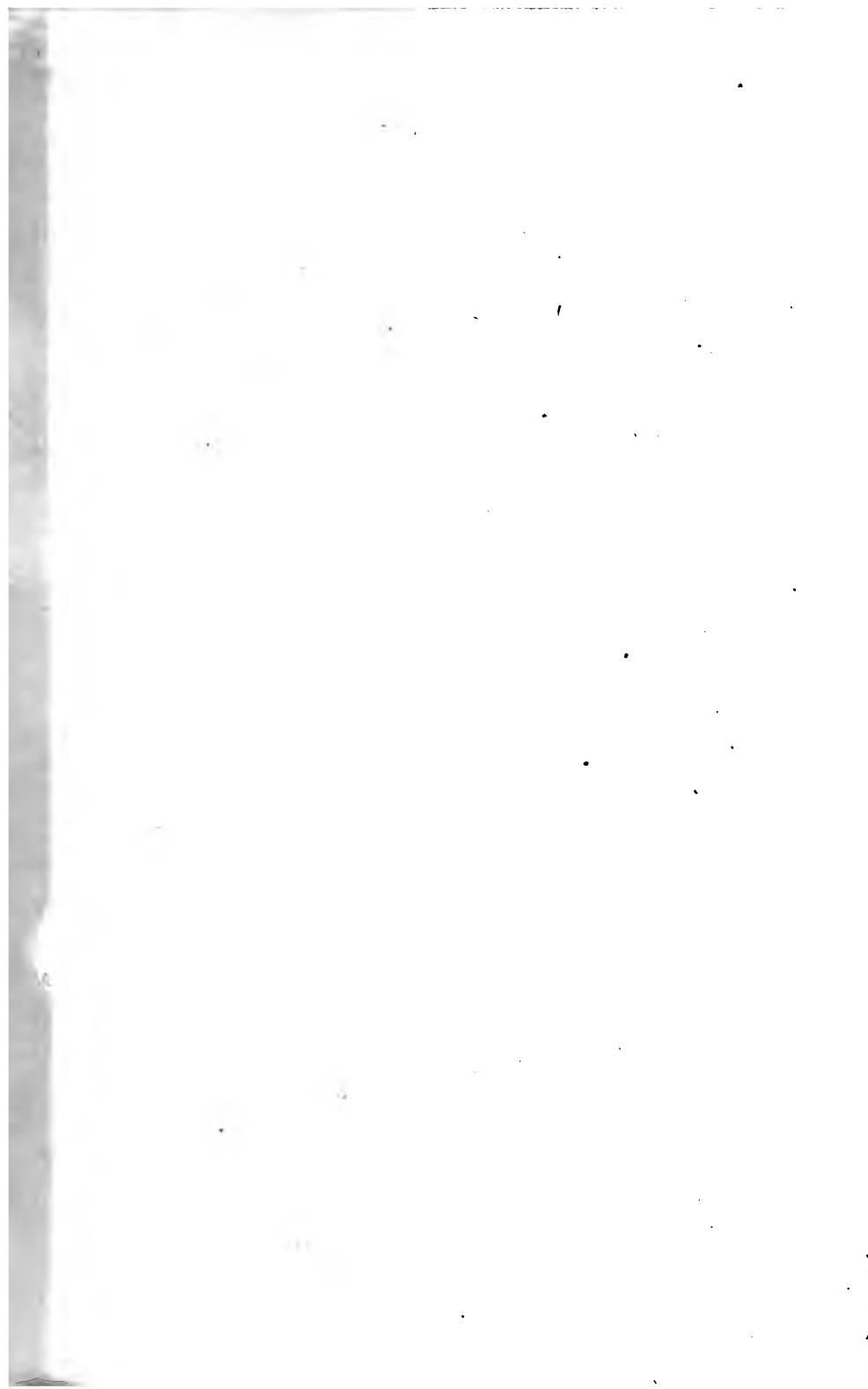
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State Reports - N.Y.







REPORTS

C A S E S

ARGUED AND DETERMINED

IN THE
New York (State)
Supreme Court of Judicature,

AND IN THE

COURT FOR THE TRIAL OF IMPEACHMENTS

AND

THE CORRECTION OF ERRORS,

IN THE

STATE OF NEW-YORK.

BY WILLIAM JOHNSON,

COUNSELLOR AT LAW.

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THE SUPREME COURT OF JUDICATURE
OF
THE STATE OF NEW-YORK,
DURING THE TIME OF
THE EIGHTH VOLUME OF THESE REPORTS.

JAMES KENT, Esq. *Chief Justice.*
SMITH THOMPSON, Esq.
AMBROSE SPENCER, Esq.
WILLIAM W. VAN NESS, Esq.
JOSEPH C. YATES, Esq.

Attorney General.
MATTHIAS B. HILDRETH, Esq.

DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, That on the twenty-sixth day of December, in the thirty-sixth year of the Independence of the United States of America, WILLIAM JOHNSON, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Judicature, and in the Court for the Trial of Impeachments and the Correction of Errors, in the State of New-York. By William Johnson, Counsellor at Law. Vol. VIII."

In conformity to the act of Congress of the United States, entitled, "An Act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entitled, "An Act supplementary to an act, entitled, An Act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving and etching historical and other prints."

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Clerk of the District of New-York.

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T A B L E
or
N A M E S O F T H E C A S E S
REPORTED IN THE EIGHTH VOLUME.

The letter v. follows the name of the Plaintiff.

A						
Adams v. Supervisors of Columbia	328	Brewster, Skelton v.	-	-	-	376
Adams v. Dyer	347	Briggs v. Tillotson	-	-	-	304
Allen, Dean and Chamberlain v.	390	Brooks v. Bemiss	-	-	-	455
Alderman v. Tirrel	418	Brown v. Bement and Strong	-	-	-	96
Angel v. Fenton	149	Brown, Foot v.	-	-	-	64
Arnold v. Crane	79	Brush v. Bogardus	-	-	-	157
Austin v. Bemiss	356	Brush, Smith v.	-	-	-	84
		Bryden, Taylor v.	-	-	-	173
		Bullis v. Giddens and Brown	-	-	-	82
		Bush v. Barnard	-	-	-	407
		Bush and others v. Seabury	-	-	-	418
		Butterfield, Newcomb v.	-	-	-	342
B						
Backus and Whiting v. Rogers	346					
Bacon and another, Sanders and another v.	485					
Baker v. Barney	72					
Barker v. Phoenix Insurance Compa- ny	307	Caines v. Hunt	-	-	-	358
Barnard, Bush v.	407	Cairnes and Lord v. Smith	-	-	-	337
Bartlett, Jackson, <i>ex dem.</i> M'Crea, v.	361	Callaghan, Bradshaw and others v.	-	-	-	558
Barney, Baker v.	72	Cantillon v. Graves	-	-	-	472
Bates, Bayley v.	185	Carlile v. Bates	-	-	-	379
Bates, Carlile v.	379	Carr, Cooper v.	-	-	-	360
Bayley v. Bates	185	Carter v. Phelps's Administrator	-	-	-	440
Beals v. Guernsey	52. 446	Caryell, Irwin v.	-	-	-	407
Bebee, Tuttle v.	152	Case v. Potter	-	-	-	211
Bemiss, Austin v.	356	Catlin v. Jackson, <i>ex dem.</i> Gratz and others	-	-	-	520
Bemiss, Brooks v.	455	Chase v. Hale	-	-	-	461
Bement and Strong, Brown v.	96	Chapman v. Raymond	-	-	-	360
Benedict, Verney v.	360	Chestney v. Coon	-	-	-	150
Bennett, Herrick v.	374	Clark v. Foot	-	-	-	421
Benjamin, Jackson, <i>ex dem.</i> Brom- ley v.	101	Clement v. Crossman	-	-	-	287
Bogardus, Brush v.	157	Cleis, Hart v..	-	-	-	41
Bradish v. Schenck	151	Cobb v. Curtiss	-	-	-	470
Bradshaw and others v. Callaghan	558	Cole v. Wendel	-	-	-	116
Bradt v. Walton and Vanhorne	298	Columbia, Supervisors of, Adams v.	323			
		Columbian Insurance Company,				
		Robertson v.				491

TABLE OF CASES

Columbian Insurance Company,		G
Hallett v.	272	Gardner, Jackson, <i>ex dem.</i> Butler
Cooper v. Carr	360	and others, v.
Cooley, Jackson, <i>ex dem.</i> Wilson and others, v.	128	Garlick, Fenton v.
Cook, Lane v.	359	Gelston and another, Hoyt v.
Coon, Chestney v.	150	Giddens and Brown, Bullis v.
Colwell, Crain v.	384	Given, Jackson, <i>ex dem.</i> Hum-
Commercial Insurance Company,		phrey, v.
Kane v.	229	Gleason, Pease v.
Commercial Insurance Company,		Gourlay, M'Cullum v.
Hendricks v.	1	Gracie v. New-York Insurance
Conklin, Wickham v.	220	Company
— and others v. Dyer	347	Graves, Cantillon v.
Covell, Young v.	23	Guernsey, Beals v.
Corp and others v. United Insu-		Guilderland, Niskayuna v.
rance Company	277	H
Cory, Jackson, <i>ex dem.</i> Cooper and others, v.	385	Hackley and Fisher, Cumming v.
Crain v. Colwell	384	Haff v. Marine Insurance Company
Crane, Arnold v.	79	Hale, Chase v.
Crasper, Van Benthuysen v.	257	Hall, Fink v.
Crawford v. Morrell	253	Hallet v. Columbian Insurance
Crosby, Pumppelly v.	322	Company
Crossman, Clement v.	287	Hartwell, Jackson, <i>ex dem.</i> Lynch, v.
Cumming v. Hackley and Fisher	202	Hart v. Cleis
Curtiss, Cobb v.	470	Harris, Jackson, <i>ex dem.</i> Harris, v.
D		Hardenbergh, People v.
Dakin, Frary v.	353	Hasbrouck v. Lown
Daniels, Shotwell v.	341	Havens, Vaughan v.
Dean and Chamberlain v. Allen	390	Hendricks v. Commercial Insurance
Denn, <i>ex dem.</i> Demarest, v. Wyn-		Company
koop	168	Henman, Proudfit v.
Deygert, Hewson v.	333	Herrick v. Bennett
Doty v. Turner	20	Hewson v. Deygert
Douglas, Jackson, <i>ex dem.</i> Whit-		Hood, Mather v.
man, v.	367	Hogle v. Stewart
Durell v. Mosher	445	Holly v. Rathbone
Dyer, Adams v.	347	Hopkins, Menderback v.
F		Hoyt v. Gelston and another
Feeter v. Whipple	369	Hunt, Caines v.
Felton, Angel v.	149	I & J
Fenton v. Garlick	194	
Fink v. Hall	437	Irwin v. Caryell
Fitzhugh v. Runyon	375	Irwin, M'Farland v.
Foot v. Brown	64	Jackson, <i>ex dem.</i> Bain and Van
Foot, Clark v.	421	Slyck, v. Pulver
Forman, Rodman v.	26	Beekman, v. Sel-
Frary v. Dakin	353	lick
Frier and Cooper v. Jackson, <i>ex</i>		Bromley, v. Benja-
<i>dem.</i> Van Alen and another	495	min
Fuller, Morrell v.	218	Bryant and others,
		v. Ketchum
		478
		Butler and others,
		394
		v. Gardner

TABLE OF CASES:

Jackson, <i>ex dem.</i> Cooper and others, v. Cory	385	Lewis, Putnam v.	389
Cornelius and others, v. M'Kee	429	Livingston, In the Matter of	351
Gardner and others, v. Laird	489	Low v. Rogers	321
Gratz and others, Catlin v.	520	Low v. Rice	409
Harris, v. Harris	141	Lown, Hasbrouck v.	377
Humphrey, v. Giv-en	137	, Ross v.	354
Kemball, v. Van Slyck	487	M	
Lynch, v. Hart-well	422	Marine Insurance Company, Haff v.	163
M'Crea, v. Bart-lett	361	Mather v. Hood	44
Robicheau and others, v. Swartwout	490	McCullum v. Gourlay	147
Union Academy, Trustees of, v. Plumble	378	McDonald v. Rajnox and Vantine	442
White, v. White	59	McDowles, In the Matter of	328
Whitman, v. Doug-glas	367	McFarland v. Irwin	77
Wilson and others, v. Ceoley	128	McIntyre v. Scott	159
Van Alen, Frier and Cooper v.	495	McKee, Jackson, <i>ex dem.</i> Cornelius, v.	429
Jansen, Smith and others v.	111	McLean v. Whiting	339
James v. Walruth	410	Menderback v. Hopkins	436
Johnson, Phelps v.	54	Miller v. Miller	74, 77
v. Smith	383	Mills v. Twist	121
Jones v. Scriven	453	Morrell v. Fuller	218
K		Morrell, Crawford v.	253
Kain v. Ostrander	207	Morse, Slingerland v.	474
Kane v. Commercial Insurance Company	229	Mosher, Durell v.	445
Ketcham, Thompson v.	189	N	
Ketchum, Jackson <i>ex dem.</i> Bryant and others, v.	479	Newcomb v. Butterfield	342
Kimball, Van Slyck v.	198	New-York Insurance Company, Gracie v.	237
L		Niskayuna v. Guilderland	412
Laird, Jackson, <i>ex dem.</i> Gardner and others, v.	489	O	
Lane, Porter v.	357	Ostrander, Kain v.	207
Lane v. Cook	359	Overacker, Rattoon v.	126
Lane, Wells v.	462	P	
Lansing v. Lansing	454	Peake, Wood v.	69
Lansing and others, Yates v.	289	Pease v. Gleason	409
Lansingburg, Trustees of, v. Willard	428	People v. Hardenbergh	335
Laughton, Watkinson v.	213	v. Ruggles	290
Leonard v. Vredenburgh	29	v. Runkle	464
		Phelps v. Johnson	54
		Phelps's Administrator, Carter v.	440
		Phoenix Insurance Company, Bar-ker v.	307
		Philips and Butler v. Rose	392
		Plumbe, Jackson, <i>ex dem.</i> Trustees of Union Academy, v.	378
		Porter v. Lane	357
		Potter, Case v.	211
		Powell v. Smith	249
		Proudfit v. Henman	391
		Pugsley v. Van Alen	352
		Pulver, Jackson, <i>ex dem.</i> Bain and Van Slyck, v.	370

TABLE OF CASES.

Pumpelly v. Crosby	-	-	323	Ten Eyck v. Vanderpoel	-	120
Putnam v. Lewis	-	-	389	Thompson v. Ketcham	-	189
— v. Wyley	-	-	432	Tillotson, Briggs v.	-	304
	R			Tirrell, Alderman v.	-	418
Rathbone, Holly v.	-	-	148	Tompkins, Strong v.	-	98
Rattoon v. Overacker	-	-	126	Tracy and another v. Whipple	-	379
Raymond, Chapman v.	-	-	360	Travis, Waters v.	-	566
Rainor and Valentine, M'Donald v.	-	-	442	Tuttle v. Bebee	-	152
Rice, Low v.	-	-	409	Turner, Doty v.	-	20
Richardson, Smith v.	-	-	439	Twist, Mills v.	-	191
Robertson, v. Columbian Insurance					U & V	
Company	-	-	491	United Insurance Company, Corp		
Robinson v. Executors of Ward	-	-	86	and others v.	-	277
Rodman v. Forman	-	-	26	Union Academy, Trustees of, v.		
Rogers, Low v.	-	-	321	Plumbe	-	378
— and Lambert v. Warner and				Van Alen, Pugsley v.	-	352
others	-	-	119	Van Benthuysen v. Crapser	-	257
—, Backus and Whiting v.	-	-	346	Van Slyck v. Kimball	-	198
—, Vosburgh v.	-	-	91	Van Slyck, Jackson, <i>ex dem.</i> Kem-		
Rose v. Stuyvesant	-	-	426	ball, v.	-	489
—, Philips and Butler v.	-	-	392	Van Antwerp v. Stewart	-	125
Ross v. Lown	-	-	354	Vanderpoel, Ten Eyck v.	-	120
Ruggles, People v.	-	-	290	Vaughan v. Havens	-	109
Runyon, Fitzhugh v.	-	-	375	Verney v. Benedict	-	360
Runkle, People v.	-	-	464	Vosburgh v. Rogers	-	91
	S			Vredenburgh, Leonard v.	-	29
Sanders and another v. Bacon and					W	
another	-	-	485	Wadley, Stow v.	-	124
Satterlee v. Satterlee	-	-	327	Ward's Executors, Robinson v.	-	86
Schenck, Bradish v.	-	-	151	Warner and others, Rogers and		
Scott, M'Intyre v.	-	-	159	Lambert v.	-	119
Scriven, Jones v.	-	-	453	Walruth, James v.	-	410
Sebring v. Wheedon	-	458.	460	Walton and Van Horne, Bradt v.	-	298
Seabury, Bush and others v.	-	-	418	Waters v. Travis	-	566
Sellick, Jackson, <i>ex dem.</i> Beekman, v.	-	262	Watkinson v. Laughton	-	213	
Shotwell v. Daniels	-	-	341	Wells v. Lane	-	462
Skelton v. Brewster	-	-	376	Wendel v. Cole	-	116
Slingerland v. Morse	-	-	474	Wheedon, Sebring v.	-	458. 460
Smith, Richardson v.	-	-	499	Whipple, Feeter v.	-	369
— v. Brush	-	-	84	—, Tracy and another v.	-	379
—, Johnson v.	-	-	383	Whiting, M'Lean v.	-	339
—, Powell v.	-	-	249	White, Jackson, <i>ex dem.</i> White, v.	-	59
— and others v. Jansen	-	-	111	Wickham v. Conklin	-	220
—, Cairnes and Lord v.	-	-	337	Wilbur v. How	-	444
Starr, Willett v.	-	-	123	Willard, Lansingburg, Trustees of, v.	-	428
Stewart, Van Antwerp v.	-	-	125	Willett v. Starr	-	123
—, Hogle v.	-	-	104	Wood v. Peake	-	69
Stow v. Wadley	-	-	124	Wyly, Putnam v.	-	482
Strong v. Tompkins	-	-	98	Wynkoop, Denn, <i>ex dem.</i> Demarest, v.	-	168
Stuyvesant, Rose v.	-	-	426			
Swartwout, Jackson, <i>ex dem.</i> Robi-					Y	
cheau and others, v.	-	-	490	Yates v. Lansing and others	-	289
	T			Young v. Covell	-	23
Taylor v. Bryden	-	-	173			

CASES
ARGUED AND DETERMINED
IN THE
Supreme Court of Judicature
OF THE
STATE OF NEW-YORK,
IN MAY TERM, 1811, IN THE THIRTY-FIFTH YEAR OF OUR
INDEPENDENCE.

HENDRICKS *against* THE COMMERCIAL INSURANCE
COMPANY.

THIS was an action of *assumpsit* brought for a return of *premium*, on a policy of insurance, underwritten by the defendants for the plaintiff, dated the 21st of *December*, 1808, upon goods, being tin in boxes, on board of the ship *Thomas*, "at and from *Bristol* to *New-York*," valued at 9,130 dollars. Premium, 10 *per cent.* "Warranted to have sailed from the port of *Bristol* between the 20th of *October*, and the 1st of *December*, 1808."

The cause was tried at the last *June* sittings, held in *New-York*, when a verdict was taken for the plaintiff, by consent, for 936 dollars and 48 cents, subject to the opinion of the court, on a case.

*The policy was admitted. The cargo insured was laden on board the vessel at *Bristol*, before the 1st of *December*, 1808, and the vessel sailed from *Bristol* with the whole of the cargo on board, after the 1st of *December*, and before the 21st of *December*, 1808, and safely arrived in the port of *New-York*.

Brinkerhoff, for the plaintiff, contended, that the policy, at the time it was underwritten, was an invalid contract, and being void *ab initio*, the note which was given for the premium was not supported by a legal consideration; and it having been paid by the plaintiff, he was entitled to recover the money back from the defendants.

A warranty in a policy of insurance is a condition on which the contract is founded, and unless the condition is literally performed, the contract is the same as if it never existed.*

Policy of insurance on goods, dated 21st of December, 1808, "at and from *Bristol* to *New-York*. Warranted to have sailed between the 20th of *October*, and the 1st of *December*, 1808." The cargowas wholly laden on board the vessel at *Bristol*, before the 1st of December, 1808, and arrived in safety. In an action of *assumpsit* brought by the insured for a return of the premium, on the ground of a non-compliance with the warranty, it was held that * *Park on Ins.* 422. (6th edit.)

NEW-YORK,
May, 1811.

HENDRICKS

V.
Com. Ins. Co.

the warranty,
as to sailing,
applied only to
the *voyage*, and
not to the risk
in port, and the
policy attached
on the goods in
port; and a risk
having been
run, there could
be no return of
premium. (a)

* *Coup.* 601.

† *Coup.* 603.

[* 3]

† *Coup.* 606.

The condition may depend on the happening of an antecedent or of a subsequent event.

If it depend on the happening of an antecedent event, and that event did not exist at the time the policy was underwritten, then the policy is, *ab initio*, a nullity; and being so, could not be the basis of a legal consideration.

If the condition depends on the happening of a subsequent event, and that event does not happen according to the terms of the condition, then the contract, as against the insurer, is destroyed; but not being a nullity *ab initio*, a risk may have commenced; and in such case, the underwriters would be entitled to the whole, or at least a part, of the premium.

In the case of *Bond v. Nutt*,* Lord *Mansfield* says, that "a warranty to depart on a particular day is a condition precedent;"† and in giving his opinion further, in that case, he observes, "the policy was made on the 20th of *August*, 1776, upon the contingency of a fact which must have existed, one way or the other, at the time the policy was underwritten. That contingency was, that the ship should have sailed on or before the 1st of *August*; consequently, it must have taken place or not, before the 20th of *August*."†

In the present case, the policy was made on the 21st of *December*, on the contingency of the fact, that the vessel had sailed on or before the 1st of *December*. That contingency, then, must have taken place at the time the policy was underwritten, or it was a nullity. It had not taken place at the time the policy was underwritten; therefore the policy was, *ab initio*, void.

It may, perhaps, be contended by the defendants, that the policy, by force of the word "at," attached on the goods in port; and if they had been lost before the vessel sailed, the underwriter would have been liable. But this argument is founded on the supposed existence of a fact which, according to the terms of the warranty, could not, and which, in reality, did not, exist at the time the policy was underwritten. But admitting that the goods had been lost in port before the vessel sailed, would not a non-compliance, at the time the policy was made, with an express warranty, have exonerated the underwriter from all liability for such loss? Would they not have contended that the warranty not having been performed there was no contract between the parties?

Assuming then the fact, which is admitted by the case, that there was a breach of the warranty, at the time the policy was made, there cannot be a state of facts contemplated, which could create a liability on the part of the underwriter, or, in other words, which could subject them to a risk or hazard.

(a) If a vessel is insured at and from a place, the risk commences during her stay in port: and if she afterwards sail, on an entirely different voyage, though the insure be discharged, yet there can be no return of premium. *Marine Ins. Co. of Alexandria v. Tucker*, 3 *Cranch*, 357.

And if the insurers have never run any risk, the premium must be returned.

NEW-YORK,
May, 1811.

HENDRICKS
V.
COM. INS. CO

[* 4]

**Wells*, contra, contended that the policy, in this case, covered the goods while in port; and also, on the voyage, provided the vessel sailed between the 20th *October* and the 1st *December*.

If the vessel has actually performed the voyage in safety, at the time the policy is underwritten, and that is not known to the underwriter, he may retain the premium. This is a matter of express stipulation in all our policies.*

In the case of *Hogg v. Horner*,† the vessel was insured *at and from Lisbon to England*; and though she *deviated* the moment she left *Lisbon*, yet Lord *Kenyon* held, that there could be no return of premium, as there was an inception of the risk *at*, and the contract was entire.

* *Park*, 503.
(6th edit.)
† *Park*, 394.
and 515, note.

The warranty, as to sailing on a particular day, is not a condition precedent; so as to avoid the contract where the policy is *at and from* the place; but covers the vessel in port; and during the voyage, if she sails as warranted. In *Tyrie v. Fletcher*,‡ the policy was *at and from London*, for 12 months, from the 19th of *August*, 1776, and Lord *Mansfield* laid it down, that where the risk is *entire*, and has once commenced, there could be no return of premium. And in answer to the position of Mr. *Wallace*, that where the policy is “*at and from*, provided the ship sail on or before the 1st of *August*,” the whole policy would depend on the performance of the condition, he observed, “that cannot be. A loss in port *before* the day appointed for the ship’s departure can never be coupled with a contingency *after* the day.” But he was inclined to the opinion, that there were two parts or contracts of insurance, with distinct conditions; first, the ship is insured in port, provided she is lost in port, before the 1st of *August*; second, if she is not lost in port, she is insured, *for the voyage*, from the 1st of *August*, to the port specified in the policy. The loss in port must happen before the risk on the voyage could commence; *and the risk in port must cease the moment the risk on the voyage began.

† *Coup.* 66

[* 5]

In the case of *Bond v. Nutt*, the policy was like the present, “*at and from Jamaica to London*; warranted to have sailed on or before the 1st of *August*, 1776,” and the policy was effected on the 20th of *August*, 1776. Lord *Mansfield* held, that “by force of the words *at and from* *Jamaica*, the vessel was protected in going from port to port, and *till* she sailed.” And in *Tyrie v. Fletcher*, Mr. Justice *Aston* mentions the case of *Bond v. Nutt*, to show that the policy attached on the vessel in port.

Again, in *Bermon v. Woodbridge*,§ Lord *Mansfield* refers to the case of *Bond v. Nutt*, to show that there were two risks, and that the policy covered the vessel while in port.

§ *Doug.* 781.
789

NEW-YORK,
May, 1811.
HENDRICKS
v.
COM. INS. CO.

Though the opinion expressed by Lord *Mansfield* in *Tyrie v. Fletcher*, as to the risk being divisible, has been doubted, yet this doubt relates merely to the question concerning the *apportionments* of premiums about which many difficulties existed in the *English* courts. It is now the settled rule in *England*, that where a vessel is insured "at and from" her port of departure, with a warranty to sail on or before a particular day, and she does not sail according to the warranty, there can be no return of premium; for the risk is entire and not divisible, unless there is an *express usage* to authorize an apportionment of the premium.*

* *Park*, 527.
519. (6th edit.)
Marsh. on Ins.
658, 660. (2d
edit.) *Meyer v.*
*Gregson. Long
v. Allen.*

The warranty, as to the time of sailing, applies to the *voyage*, not to the risk *in port*, which is a previous independent risk, whenever the policy is *at* and from a place. Indeed, if the doctrine of the plaintiff's counsel is correct, it must follow, that in every case, where there is an insurance at and from a port, with a warranty to depart with convoy, and that vessel should be lost in port, there could be no recovery, because the warranty was not performed.

[* 6]

* If, under any circumstances, the insurer might, at any time, have been called upon to pay the whole sum insured, the *premium* is earned, and he shall not be obliged to return any part of it.† Now, in the present case, the policy attached on the goods in port; and if the goods had been lost before the vessel sailed, as if she had sunk with them in port, or been burnt, or it had become necessary to throw them overboard, the underwriters would have been liable for the loss.

† *Tyng's Rep.*
1. 151.

In the case of *Taylor v. Lowell*,† in the Supreme Court of Massachusetts, the policy was *at and from Calcutta*, to a port of discharge in the *United States*. The policy was dated the 13th of *January*, 1798, and the insurer *represented*, at the time, that the ship was at *Calcutta* in *July*, 1797, and would probably sail in *August*, 1797. She sailed on the 19th of *August* for the *United States*, but proved unseaworthy, and put back to *Calcutta*, from whence she did not sail until the 1st *February*, 1798; it was held, that the policy attached and covered the subject while in port, and that there could be no return of premium.

VAN NESS, J. The question arising in this case is, whether the policy ever attached upon the subject insured; and if it did, though only for a single moment, it is admitted there can be no return of premium. On the part of the plaintiff, it is contended, that as the ship did not sail from the port of *Bristol* until after the 1st *December*, the goods were never at the risk of the assurer, and the vessel and cargo having arrived in safety, the premium ought to be returned. The defendant, on the other hand, insists that the insurance being *at and from Bristol*, the goods were covered whilst in port, and that the warranty to have sailed applies to the risk on the *voyage*, and

OF THE STATE OF NEW-YORK.

*7

not to the risk in port. This, at first view, would seem to be a case of difficulty; but I think, *when well understood, it is clearly with the defendant, as well upon principle as authority.

NEW-YORK
May, 1811.HENDRICKS
v.
Com. Ins. Co.

In the construction of this, as well as of every other written contract, efficacy must, if possible, be given to every part of it. If the construction relied upon by the counsel for the plaintiff be correct, then the word *at* in this policy is altogether nugatory. The insurance here, upon the face of the policy, is as well at the port of *Bristol*, as for the voyage, and we are to presume that the rate of premium was regulated accordingly. If there had not been a warranty respecting the time the vessel should sail, there could not be a return of premium. It is to be examined, therefore, whether in this case we are compelled to reject this part of the contract, as being repugnant to the terms of the warranty. That the assured contemplated that these goods should be protected at the port of *Bristol*, provided the goods were put on board the vessel there, before the 1st *December*, is not to be disputed, because such are the express terms of the contract. If the words in this warranty had been such as are ordinarily inserted, viz. warranted "*to sail*" on or before a particular day, it is settled that there can be no return of premium, even if the voyage is never commenced. This was so decided in the case of *Meyer v. Gregson*. (*Marsh.* 558.) *Buller*, J. said that in all insurances from *Jamaica*, the policy runs, "*at and from*," and though in many instances the voyage has not been commenced, yet there never was an idea of the premium being returned: and to show there could be no apportionment in that case, he adds, "and no usage has been found by the jury." And in the case of *Long v. Allen*, (*Marsh.* 570,) the same principle was admitted, though in that case there was an apportionment of the premium, the jury having found the usage. So in the case of *Tyrie v. Fletcher*, (*Cowp.* 666,) *Lord Mansfield* says, "a case of general practice was put by *Mr. Dunning*, where the words of the policy are *at and from*, provided the ship sail on or *before the 1st of *August*. A loss in port, before the ship's departure can never be coupled with a contingency after the day; but if a question should arise about it, as at present advised, I should incline to be of opinion that it would fall within the reasoning of the determination in *Stevenson v. Snow*, and that there are *two parts* or contracts of insurance with distinct conditions. The first is, I insure the ship in port, provided she is lost *in port*, before the 1st of *August*; and second, if she is not lost in port, I insure her then during her voyage, from the 1st of *August* till she makes the port specified in the policy." And here I would observe, that the case put by *Mr. Dunning*, and to which *Lord Mansfield* gives the answer, is a much stronger case than the present.

The principle upon which these cases were decided, is this, that the warranty to sail applies to the voyage, and not to the

[*8]

NEW-YORK,
May, 1811,
HENDRICKS
v.
Com. Ins. Co.

risk in port, which is a previous and independent one, whenever the policy is *at and from*. That this is the principle is apparent from the reason of inserting this kind of warranty in the policy. In *Marshall*, 253, it is said, that "the time of sailing is so material, that in many policies there is a warranty to sail on or before a certain day. Independently of the effect which a difference of seasons may have upon the risk, and of the necessity there is that the voyage shall end in a reasonable time, it is of great importance when the policy is *at and from* a place, that there be a day fixed for the ship's departure, in order that the duration of the *risk at the place* may be ascertained." If this be the true reason, as it undoubtedly is, the policy attaches the moment it is effected, and the risk having been run in port, there can be no return of premium, even if the voyage is never undertaken. Consequently, here can be no return of premium.

The rule in *England* now appears to be, to apportion the premium, where usage has settled the rule of apportionment. (*Long v. Allen.*) With us, however, there never is an apportionment, because we have no usage.

[* 9]

*Lord *Manfield* may not always have been consistent in what fell from him on the doctrine of dividing the risks and apportioning the premiums; but I believe that in every case he will be found uniformly to have considered the risk *at the port* and *on the voyage*, to be distinct; and that when the subject insured had been at the risk of the assurer for one moment, the policy attached. But it has been said that the words in this case are different from those used in the cases I have mentioned. They are so. The words here are, "warranted *to have sailed*," &c. Will this make any difference in the construction of the contract? I think not; and that the legal effect in both instances is precisely the same. In the first place, there ought not to be a different effect given to these words, because the difference in the phraseology arises altogether from a difference in the time when they are used. If a policy be effected before the day when the vessel is warranted to sail, the words are "warranted *to sail*," &c.: because in such case the event to which they refer is yet to happen. When, however, an insurance is made upon a vessel abroad, with a warranty that she shall have sailed on a day already past, the phraseology must necessarily be varied accordingly. It would, therefore, in the case before us, have been absurd to say, "warranted *to sail*" (the policy being dated 21st *December*, 1808) on or before the 1st day of *December*, instant. This, then, being the reason for the difference in the words, it would seem to me to be unjust and unreasonable to give them a different effect, contrary to what must have been the contemplation of the parties. The reasons for inserting them in this policy were precisely the same as they would have been, if this insurance had been effected before the day when it was

OF THE STATE OF NEW-YORK.

9

agreed the vessel should have departed from *Bristol*. The words (taking into view the time when this policy was effected) are substantially the same; the risk is the same: the premium of course would be the *same; and yet, strange as it may seem, the legal consequences, it is contended, are different.

NEW-YORK,
May, 1811.

HENDRICKS
V.
COM. INS. CO.
1

[* 10]

To show that what has been said, as to the true construction of these words, is correct, I refer to the case of *Bond v. Nutt*, (Coup. 601.) There, as in this case, the insurance, which was "at and from," was effected after the day stipulated for the sailing of the ship, and the words are precisely similar to those in this policy, "warranted to have sailed." Lord *Mansfield*, in the course of his opinion, says, "The policy was made on the 20th *August*, 1776, upon the contingency, &c. of a fact which must have existed one way or the other, at the time the policy was underwritten. That contingency was, that the ship should have sailed on or before the 1st *August*; consequently it must have taken place, or not, upon the 20th of that month. The port from whence the ship was to be insured was, if I may use the expression, the whole island of *Jamaica*; but from which of the ports neither party knew; therefore they have used the words 'at and from *Jamaica*,' &c. by force of which she certainly *was protected from port to port, and till she sailed*." In the case of *Tyrie v. Fletcher*, decided about six months after, *Aston*, J., who was a party to the decision in *Bond v. Nutt*, in speaking of the latter case, says, "In *Bond v. Nutt*, the losses insured against were distinct and unconnected with each other. 1. A loss of the ship in port, if any should happen there. 2. A loss in the passage home, provided she sailed on a certain day. Again, in *Bermon v. Woodbridge*, (Doug. 780) Lord *Mansfield*, in referring to the case of *Bond v. Nutt*, says, "It was held in that case, there were two risks; at *Jamaica* was one; the other, viz. the risk from *Jamaica*, depended on the contingency of the ship having sailed on or *before the 1st August*. That was a condition precedent on the voyage from *Jamaica to London*."

There can, after this, be no difference of opinion, I imagine, as to what was declared to be the law in the case of **Bond v. Nutt*, and this alone would be decisive in the present case. And is not this a reasonable interpretation of this policy? It gives effect to every part of the contract, and effectuates the undisputed intention of the parties. The vessel in this case was warranted to have sailed before the 1st *December*. Now suppose she had been burnt or sunk in port, after the goods were on board, so that it became physically impossible she could comply with the warranty, can it be possible that the assurer would not have been liable for the loss? If the warranty had been "to sail," it is admitted the defendants would, in such a case, have been liable; and why not, when the words are "war-

[* 11]

NEW-YORK,
May, 1811.

VS
ANDREWS
V.
Com. Ins. Co.

ranted to have sailed?" At the time when this policy was executed, it was unknown to both parties whether the ship and goods were in safety or not; and in such a case, it is too well settled to be any longer controverted, that the validity of the policy is not affected by the circumstance, that the loss had already happened at the time of underwriting the policy, especially, when this is matter of express stipulation.

It may be supposed that the decision in the case of *Hore v. Whitmore*, (Coup. 784) is opposed to the construction which I have adopted. That case turned upon a very different point. The ship sailed after the day, and was captured on the voyage, and the assured claimed as for a loss by capture. The warranty applied to the voyage, and being broken, the underwriters were properly held to be discharged. If the ship had been lost in port, before the day she was to sail, there can be no doubt the assurer would have been liable. Neither can there be a doubt that the detention, in that case, was one of the perils insured against, and for which, while it lasted, the assured might have abandoned, and thus charged the assurer with the loss in port.

There is still one ground taken by the counsel for the plaintiff which it is necessary to notice. It is urged that every warranty is a condition precedent, and that the condition upon the performance of which this policy was to attach is, that the ship had sailed on a day past. To this several answers may be given, each of which appears to me to be equally conclusive. In *Marsh.* 248, 249, warranties are said to be "either affirmative, as when the assured undertakes for the truth of some positive allegation, as that the ship sailed on such a day," (which is the present case) "or they may be promissory, as where the assured undertakes to perform some executory stipulation, as that a ship shall sail on or before a given day," &c. But whether the warranty be the one or the other, is perfectly immaterial; both are equally conditions precedent. In case of a stipulation that a ship shall sail, &c. the warranty is a condition precedent, as much as in this case, when it was warranted that the ship had sailed. In the first, I have already shown, indeed it is admitted, that the condition applies to the risk for the voyage, and not to the risk in port. If the condition in this case applies to both risks, I beg to know upon what principle? Surely not because the warranty is more a condition precedent in the one case than it is in the other. Another answer is, that the risk in port is neither increased nor diminished by the performance or violation of the warranty, because the risk terminates on the day the ship is to sail, whether she commences her voyage or not. Neither the degree of danger nor the duration of it, is changed by the difference in the words of the policy. The last answer is, that this point has been solemnly adjudged otherwise, and upon principles and for reasons with which I am perfectly satisfied

[* 12]

My opinion, therefore, is, in every view I have been able to take of this question, that the defendants are entitled to judgment.

NEW-YORK.

May, 1811.

HEDRICKS

v.

COM. INS. CO.

THOMPSON, J. and KENT, Ch. J. were of the same opinion.

*SPENCER, J. I am constrained to dissent from the opinion of the court. In my judgment, the policy in this case never attached, and the plaintiff is consequently entitled to judgment for the premium paid by him. My brethren suppose that the policy attached, reformatively, on the goods laden on board, before the first of *December*; the insurance being *at* as well as *from Bristol*. The vessel is "warranted to have sailed from the port of *Bristol*, between the 20th of *October*, and the 1st of *December*, 1808." The contract between the parties was entered into after the day when the ship was warranted to *have sailed*, to wit, the 21st of *December*, 1808, and the ship sailed from *Bristol* after the 1st of *December*, but before the policy was subscribed. It becomes necessary to consider the nature and effect of warranties in policies, in order to show that this policy never attached.

[* 13]

Marshall on *Insurance*, 248, (p. 346, 2d edit. book I. c. 9. s. 1) gives an analysis of warranties which appears to me to be able and perspicuous. He says, "a warranty is a stipulation or agreement on the part of the insured, in nature of a condition precedent. It may be either affirmative, as where the insured undertakes for the truth of some positive allegation; as that the thing insured is neutral property, that the ship is of such a force, that she sailed or was well on such a day, &c.; or it may be promissory, as where the insured undertakes to perform some executory stipulation, as that a ship shall sail on or before a given day, that she shall depart with convoy, that she shall be manned with such a complement of men," &c.

Again, he observes, "The breach of a warranty consists either in the falsehood of an affirmative, or the nonperformance of an executory stipulation;" and he adds, that "in either case, the contract is void, *ab initio*, the warranty being a condition precedent. Whether the thing was material or not, whether the breach of it proceeded from fraud, negligence, misinformation, or any other *cause, the consequence is the same. The warranty makes the contract hypothetical, that is, it shall be binding, if the warranty is complied with. With respect to the compliance with the warranties, there is no latitude, no equity; the only question is, has the thing warranted taken place or not. If it has not, the insurer is not answerable for any loss, even though it did not happen in consequence of the breach of warranty." The same principles are laid down by Lord Mansfield, in *Hibbert v. Pigou, Marsh.* 272, (p. 369, 2d edit.) and *Park*, 339. (p. 443, 6th edit.) Again,

[* 14]

NEW-YORK,
May, 1811.

HENDRICKS
v.
Com. Ins. Co.

in the case of *De Hahn v. Hartley*, (1 Term Rep. 343) Lord *Mansfield*, after stating the effect of a representation, proceeds, "But a warranty must be strictly complied with. A warranty in a policy of insurance is a condition or a contingency, and unless that is performed there is no contract. It is perfectly immaterial for what purpose a warranty is introduced; but being inserted, the contract does not exist until it is literally complied with."

In the case of *Henckle v. The Royal Exchange Assurance Company*, (1 Vez. 318) the warranty was that the ship insured was an *Ostend* ship, and it was held by Lord *Hardwicks*, that the fact being untrue, the ship was never brought within the terms of the insurance.

It appears then, from the cases cited, that where the warranty is of a thing past or present, it is an affirmative stipulation; and the contract between the parties being hypothetical, it operates as a condition precedent; and unless the fact warranted be true, there is no contract between them. If the warranty be executory, as that the ship shall sail on a given day, and the policy be *at* and *from*, then, inasmuch as the policy immediately attaches, and the risk commences and endures until the warranty be broken by a failure of performance of the fact stipulated; and inasmuch as there can be no apportionment of the premium, on a single risk, the insured would not be entitled to a return of any part of the premium, because the executory event did not take place.

[* 15]

*I must not, for a moment, be understood as countenancing the idea, that an event already past may not be the subject of insurance. Nothing is more common, and nothing can be fairer; because, although the contingency may have happened, in point of fact, yet the parties being ignorant of the event, it is, as to them, contingent, and the assurer, in such a case, takes upon him the risk, on the hypothesis that the subject insured may be lost. In the present case, had any of the goods insured been lost in port, by any of the perils in the policy, before the 1st of *December*, and had the ship sailed pursuant to the warranty, the defendants would have been on the policy, and answerable for the loss; but the fact of the ship's sailing before the 1st of *December*, being a fact warranted by the insured, and being untrue at the time the contract was entered into, and the whole contract depending on the verity of the fact of the ship's having sailed before the first of *December*, the subject matter of the insurance was never brought within the terms of the insurance, and consequently there never was a contract between the parties. There is no difference between a warranty that a ship sailed on a day past, which was anterior to the policy, and a warranty that a ship has a particular quality, as that she is an *Ostend* ship. They are both affirmative warranties, operating as conditions precedent; and it appears to me to be violating every rule, in rela-

tion to conditions precedent, to maintain that though they are NEW-YORK,
not true, and are never performed, yet that the party who May, 1811.
warranted them to be true, and stipulated that they had been HENDRICKS
performed, as the very basis of the contract on the other side, V.
is dispensed from their performance. COM. INS. CO.

The case of *Bond v. Nutt* (Coup. 610) has been relied on by the counsel on both sides, as favorable to their respective clients. The insurance was upon a ship, lost or not lost, at and from *Jamaica* to *London*, warranted to have sailed before the 1st of *August*, 1776. The policy was effected on the 20th of *August*. The point was, whether the voyage was to be considered as begun from *St. Ann's Bay*, from which the ship sailed the 26th of *July*, or from *Bluefields*, from which she did not sail till after the 1st of *August*. The ship was lost, and the action was to recover for the loss of the ship. The question of a return premium never arose, as the defendants paid the whole premium into court, which was taken out by the plaintiff before the trial. (Dowg. 785, note 1.) Lord *Mansfield*, in the course of his opinion, asks, "had she or had she not sailed on or before that day? That is the question; no matter what cause prevented her, if the fact is that she had not sailed, though she staid behind for the best reasons, the policy was void, the contingency had not happened, and the party interested had a right to say there was no contract between them."

It is impossible to find language more emphatic than that employed by his lordship; and the cases are precisely analogous in principle. It is true the insured in that case recovered on the ground that the ship had commenced her voyage before the 1st of *August*. Had it been deferred until after that day, then the observations made by Lord *Mansfield* would have been decisive.

Lord *Mansfield* may be quoted in contradiction to himself, from what fell from him in *Tyrer v. Fletcher* (Coup. 669, 670.) The point was, whether the risk was entire or divisible; if the latter, then the insured claimed a return of part of the premium. He observes, "a case of general practice was put by Mr. *Dunning*, where the words of the policy are *at and from, provided the ship shall sail on or before the 1st of August*, and Mr. *Wallace* supposes that the whole policy would depend upon the ship's sailing before the stated day. I do not think so; on the contrary, I think with Mr. *Dunning*, that cannot be. A loss in port before the day appointed for the ship's departure can never be coupled with a contingency after the day;" and he proceeds to give the inclination of his mind, that there would be two parts or contracts of insurance, the first on the ship in port, if lost before the first of *August*, and if not lost in port, then on the voyage. What fell from his lordship on that occasion, is correctly considered by Mr. *Park*, 390 (6th edition, p. 528) as an *obiter dictum*, over-

[* 16]

[* 17]

NEW-YORK, ruled by himself in *Meyer v. Gregson*, (Park, 389). But he was not considering the case of a warranty to sail on or before a given day. *Marshall*, (2d edit. pp. 667, 658) in the notes, observes of this case, that the word "provided" made the sailing a condition on which the contract was to take effect, and one part of the case put as repugnant to the other, and that the word "at" in the policy was nugatory; and he agrees with Mr. Park, that the opinion was extra-judicial, hastily delivered, or, perhaps, not accurately reported, and that it was overruled by the case of *Meyer v. Gregson*. If his lordship meant to speak of a warranty, this *dictum* of his is overthrown by the subsequent case of *Hore v. Whitmore*, (Coup. 784) in the decision of which the court, including his lordship, was unanimous. In that case the ship was warranted to sail on or before the 26th of July, 1776, before which day she was restrained from sailing by the governor of *Jamaica*, and detained beyond the day; the ship was insured free from all restraints and detainments of kings, princes, and people, &c. and she would have sailed but for the restraint; and it was adjudged that the warranty being express, that she should depart before a certain day, must be complied with, though the cause of the delay was one of the risks insured against. This case furnishes a pretty full answer to the idea that there were two distinct risks in this case, the one in port and the other on the voyage. My doctrine is, that there was but one risk in port and on the voyage, depending entirely on the fact that the ship had sailed according to the warranty. I am again met with another *dictum* of Lord *Mansfield's*, in the case of *Bremen v. Woodbridge*, (Doug. 751) in which he says, "In *Bond v. Nutt* it was held there were two risks; *at *Jamaica* was one; the other, viz. the risk from *Jamaica*, depended upon the contingency of the ship having sailed on or before the first of *August*; that was a condition precedent to the insurance on the voyage from *Jamaica* to *London*." I do not intend any thing disrespectful to that great man, when I say, that neither his lordship, nor any of the judges, held any such doctrine in *Bond v. Nutt*. On the contrary, he emphatically said, "that if the ship did not sail before the first of *August*, the policy was void, the contingency had not happened, and the party interested had a right to say there was no contract between them." In the case of *De Hahn v. Hartley*, already cited, he expressed himself to the same effect as in *Couper's* report of *Bond v. Nutt*.

The risk in port is either divisible or entire. If entire, and the policy attached so as to cover the goods laden on board before the first of *December*, and while the ship was in port, I cannot conceive why the risk did not endure as well in port as on the voyage. But my brethren seem to think these two risks, according to Lord *Mansfield's* *dictum* in *Tyrie v. Fletcher*, the one in port, absolutely, and the other on the

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HEDRICKS  
v.  
COM. INS. CO.

[ \* 18 ]

voyage, contingently, if the ship sailed by the appointed day ; and holding that opinion, how can it be, that the plaintiff is not to have a return of part of the premium ; for it is perfectly well settled that where the voyage is divisible into distinct risks, the premium is to be apportioned according to the several risks. (*Marsh.* 655. 3 *Burr.* 1237. 1 *Bos. & Pull.* 172.) The cases of *Meyer v. Gregson*, and *Long v. Allen*, (*Marsh.* 658. 660) which are supposed to apply to this case, are very different. In those cases the risks were single, and the warranties were executory, or warranties to sail by a given day, and not warranties that the ships had sailed. The underwriters were on the policies for the voyages, and a risk was incurred between the time of subscribing the policies and the time when the future events were stipulated \*to take place. In the present case, the warranty was that an event had already taken place ; and on the truth of that warranty the whole policy depended.

It cannot, I think, be seriously contended, that where no risk has been run, and no fraud practised, the assurer has a right to pocket the premium. "The premium," says *Marshall*, 548, (2d edit. 638) "paid by the insured, and the risk which the insurer takes upon himself, are considerations each for the other ; they are correlatives, whose mutual operation constitutes the essence of the contract of insurance. The insurer shall not be exposed to the risk, without receiving the premium ; nor shall he retain the premium, which was the price of the risk, if, in fact, he runs no risk at all. For wherever a man receives the money of another upon a consideration which happens to fail, or is never performed, he is under an obligation, from the ties of moral honesty and natural justice, to refund it ;" and he cites a variety of cases in support of this opinion. To these cases may be added the opinion of Lord *Hardwicke*, in *Henckle v. Royal Exchange Assurance Company*, that, if the ship was never brought within the terms of the insurance, so that the insurer never runs any risk, the premium must be returned in an action by the assurer.

I am not aware of any adjudged case controverting the right of the insured to a return of premium, where there has been no risk, and where there exists no fraud. It would require something very authoritative to induce me to deny a recovery in case of such strong equity. I shall only add, that although this appears to the court to be a plain case for the defendants, to my understanding, the law warrants the plaintiff's recovery

YATES, J. was of the same opinion.

Judgment for the defendants.

NEW-YORK,  
May, 1811.  
HENDRICKS  
v.  
Com. Ins. Co

[\*19]

NEW-YORK,  
May, 1811.

DOTY  
v.  
TURNER.

The agent of the plaintiff delivered an execution to a sheriff, and directed him to levy it on the property of the defendant, but said to the sheriff that he supposed the plaintiff did not wish to distress the defendant, and that if the property remained in the possession of the defendant after the levy, the plaintiff would not hold the sheriff responsible, if it was squandered, and that he need not take a receipt for it. The sheriff, after levying on the goods of the defendant, did nothing further,

[\* 21] until after the execution had expired, and a second execution was delivered to him, when he sold the property on both executions. It was held, that as there were no instructions from the plaintiff to delay the execution, after the seizure, nor any agreement between the plaintiff and the defendant to let the first execution sleep in the sheriff's hands; nor any evidence of such a delay as would afford a legal presumption of fraud, the first execution did

\*DOTY against TURNER, late Sheriff of Rensselaer.

THIS was an action of *assumpsit*. The declaration contained two counts. 1. That the defendant, being indebted to the plaintiff for 200 dollars, collected and received by the defendant, on a *fieri facias* issued out of this court, at the suit of the plaintiff, against the goods and chattels of *John Pierce*, tested, &c. on a judgment, &c. and being so indebted, the defendant assumed and promised, &c. 2. For money had and received to the use of the plaintiff. Plea, *non assumpsit*.

The cause was tried at the *Rensselaer* circuit, in 1810, before Mr. Justice *Van Ness*.

The plaintiff gave in evidence the record of the judgment and the *fieri facias*, on which was the following endorsement: "This execution was delivered into the sheriff's office, on the 2d June, 1808. The person who delivered it, a partner of the attorney for the plaintiff, said that the plaintiff, he supposed, did not wish to distress the defendant, but wished a levy to be made, so as to secure the debt, and give no other execution the preference; that if the sheriff permitted the property to remain in the possession of the defendant, he would not consider the sheriff responsible in case it was squandered; that he need not take a receipt. Levy was made on the execution; and nothing more done, or any further instructions given, until after the return day of this execution, nor till after the receipt of another *fieri facias* against the said defendant, at the suit of *Calvin Barker*, issued out of the supreme court, for 279 dollars and 43 cents, and a levy was \*made under it on the same property. When I received instructions to proceed on this execution, I advertised the property for sale by virtue of both executions, and have levied and made the sum of 263 dollars and 50 cents, which I have ready to deliver to *Ellis Doty*, the within-named plaintiff, to the amount of the execution, or to *Calvin Barker*, named in the other execution, as the court shall award and order, and the within-named *John Pierce* hath not any other or more goods and chattels, lands or tenements, in my bailiwick, whereby I can cause to be levied and made, the residue of the debt and damages mentioned in the two executions, or either of them."

The plaintiff's counsel called the partner of the plaintiff's attorney, who delivered the execution to the sheriff, for the purpose of falsifying the return. He was objected to by the defendant, but the judge overruled the objection. He testified that he gave the execution to the deputy of the sheriff, and directed him to proceed thereon; but at the same time told him that he did not believe it would be the plaintiff's wish to distress *Pierce*, as he was the plaintiff's father-in-law; and that there was no occasion to get a receipt for the property,

after he had levied on it, as *Pierce* would not squander or conceal it, and he need not remove the property. He did not tell the deputy sheriff to delay proceeding on the execution, until after the time it was made returnable.

The deputy sheriff who made the return, after being released by the witness, testified to the truth of the return. Nothing was said to him, as to the time to which the delay of the execution was to extend; but he did not understand it was to be delayed, so as to suffer another execution to gain a preference.

It was further proved, that no money was actually paid to the defendant; but the property was bid off by the subsequent creditor, and was accepted by the defendant, as a payment on the subsequent execution.

\*The judge directed the jury to find a verdict for the plaintiff for the amount of his execution, with interest, on the ground that there had not been such a delay by the plaintiff, as to give a preference to the second execution; and the jury found a verdict accordingly.

A motion was made to set aside the verdict, and for a new trial: 1. Because the judge admitted improper testimony; 2. Because he misdirected the jury.

*Foot*, for the defendant.

*H. Bleecker*, contra. He cited 1 *Wils.* 44. *Peake's N. P.* 65. 2 *Bos. & Pull.* 59. 2 *Saund.* 344. 2 *Lord Raym.* 1075. *Cro. Jac.* 514. 3 *Wils.* 14.

*Per Curiam.* The question is, whether the first execution is to be deemed fraudulent, as against the second, in consequence of the directions given by the agent of the plaintiff to the sheriff. It was competent for the plaintiff to prove by the agent what those directions were, notwithstanding the return, for the recital on the subject in the return, was of extrinsic matter, not appertaining to a strict official return. The testimony given by *Houghton* does not, however, essentially vary from that stated by the defendant. The information given to the defendant upon delivery of the execution, was, that he need not remove the property to be levied on out of the possession of *Pierce*, nor need he take a receipt for it. This he said upon the supposition or belief, that the plaintiff did not wish to distress *Pierce*. There were no instructions to delay the proceedings after seizure, and the defendant only inferred a consent to the delay which took place. There was no

(a) Merely leaving property levied upon, in the possession of the defendant, though with the consent of the plaintiff, is not *per se* fraudulent as against subsequent creditors or purchasers. *Rew v. Barber*, 3 Cowen, 272—*a fortiori*, where there is no act of the plaintiff. *Russell v. Gibbs*, 5 Cowen, 390. And see *Power v. Van Buren*, 7 Cowen, 560. *Benjamin v. Smith*, 4 Wendell, 332. *Hicok v. Coates*, 2 Wendell, 419. *Storm v. Woods*, 11 Johns. R. 119.

(b) *Vid. Denton v. Livingston*, 9 Johns. R. 96. *Armstrong v. Garrow*, 6 Cowen, 465.

NEW-YORK,  
May, 1811.

DOTY  
v.  
TURNER.

not lose its preference. (a)  
Where the sheriff returns that he has a certain sum made by virtue of the execution ready to deliver to the party entitled, this is a sufficient evi-

[ \* 22 ]  
dence of a receipt of the money to charge him with the amount, though, in fact, no money was actually received by him. (b)

NEW-YORK,  
May, 1811.

Young  
v.  
Covell.

[\* 23]

agreement between the plaintiff and *Pierce*, that the execution should sleep in the sheriff's hands; and it does not appear, from the case, what time elapsed between the delivery of the first and second execution. The case, therefore, does not come \*within the rule of the common law recognised in *Whipple v. Foot*. (2 *Johns. Rep.* 418.) If a long time had intervened between the one execution and the other, it would have been ground for the jury to have inferred the consent of the plaintiff to the delay, and might have established the legal presumption of fraud. The direction to the jury was correct.

The return states that the defendant has 263 dollars and 50 cents, made by virtue of the sale under both executions, which he is ready to deliver to the party entitled. This was evidence sufficient of the receipt of the money; and the arrangement between the sheriff and the purchaser shows that the former was willing to consider that arrangement as equivalent to the payment of the money. The return authorised the jury to infer the actual receipt of the money; and as the plaintiff in the first execution had not lost his preference, the motion on the part of the defendant to set aside the verdict is denied.

Motion denied.

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### YOUNG and OTIS against COVELL.

To maintain an action, as for a deceit, on a parol representation as to the credit and responsibility of a third person, the defendant

[\* 24] must prove actual fraud in the plaintiff, or an intention in the defendant to deceive him by false representations. *Deceit* is the *gist* of the action; and though the advice given be rash and indiscreet, yet if there is no ground to infer an intent to deceive, it will not support the action. (a)

THIS was an action on the case. The declaration contained six counts. The first count stated that the plaintiffs were, on the 17th of April, 1806, joint owners of the one half of the sloop *Alert*. *Young* lived in *Troy*, and *Otis* in *New-York*. One *Davis*, of *Rhode-Island*, applied to *Young*, at *Troy*, to purchase the half of the sloop, belonging to the plaintiffs, and offered to \*pay 800 dollars on the sale and delivery of the sloop, and 700 dollars on a credit; and *Young* being ignorant of the circumstances and credit of *Davis*, or whether he might be safely trusted, at the instance of *Davis*, applied to the defendant, being a merchant in *Troy* for information as to the credit, character, and circumstances of *Davis*, and requested the defendant to inform him truly as to the credit, &c. of *Davis*; and the defendant, fraudulently intending to deceive the plaintiffs, and to induce them to sell and deliver the moiety of the said sloop to the said *Davis*, did, on the said 17th of April, 1806, at, &c. falsely, knowingly, fraudulently, and deceitfully, represent to the said *Young*, that the plaintiffs might trust the said *Davis* with perfect safety; that the defendant had no doubt of the credit of *Davis*; and if *Davis*

(a) Vide *Gallagher v. Brunel*, 6 *Cowen*, 346. *Benton v. Pratt*, 2 *Wendell*, 383. *Russell v. Clark's Executors*, 7 *Cranch*, 69.

wanted 5,000 dollars the defendant would let him have that sum ; that the plaintiffs, confiding in the representation of the defendant, sold and delivered to *Davis* the one moiety of the sloop for 800 dollars in cash, and 700 dollars, one half thereof to be paid in 90 days, and the other half in six months. The plaintiff averred, that the defendant, at the time he made the representation to *Young*, knew that *Davis* could not be safely trusted, &c. and that *Davis* has not paid the 700 dollars, and was, and is, wholly unable to pay the said sum, or any part thereof, to the plaintiff. The other counts were to the same effect. The defendant pleaded not guilty.

At the trial, before Mr. Justice *Van Ness*, at the *Rensselaer* circuit, in *June*, 1810, the plaintiffs proved that they were the owners of the one half of the sloop *Alert*, and the conversation between *Young* and *Davis* as to the purchase and sale, at which the defendant was present, and very highly recommended *Davis*, saying, that if *Davis* wanted 5,000 dollars, he, the defendant, would let him have it in a minute. But the witness did not know whether the defendant had been sent for, or was present by accident. The sale was concluded on the \* terms stated. The defendant stated that he knew the father and father-in-law of *Davis*, and all their connections, and that they were all abundantly able. A few days after the sale, within one week, and while the sloop still lay at the dock in *Troy*, the defendant told the plaintiffs that *Davis* was a rascal, and not worth a cent, and that if the plaintiffs wished to secure themselves, they must do it then ; and the sloop continued at *Troy*, two or three days after this information. It appeared also that the plaintiffs refused to trust *Davis*, until he procured some person to vouch for his responsibility. There was no evidence that the defendant knew *Davis*, or had ever seen him before he came to *Troy*, in a vessel from *Rhode-Island*. The defendant was a man of good credit, a next-door neighbour of the plaintiffs, and on friendly terms with them. The father and father-in-law of *Davis* were persons in good circumstances ; but *Davis* himself was a bankrupt.

A motion was made for a nonsuit, and the judge ruled, that the evidence was insufficient to sustain the action, and nonsuited the plaintiffs ; on which a bill of exceptions was tendered, which was sealed by the judge, and returned to this court, pursuant to the act of the 30th of *March*, 1809, (32 sess. c. 186. s. 5.)

A motion was made to set aside the nonsuit, which was argued by

*Foot*, for the plaintiffs ; and

*Bliss*, for the defendant.

*Per Curiam*. It is well settled that this action cannot be

NEW-YORK  
MAY, 1811.

YOUNG  
v.  
COVELL.

[\* 25]

NEW-YORK,  
May, 1811.

RODMAN  
v.  
FORMAN.  
[ \* 26 ]

sustained without proving actual fraud in the defendant, or an intention to deceive the plaintiff by false representations. The simple fact of misrepresentation, unconnected with a fraudulent design, is not sufficient. The evidence produced by the plaintiffs at the trial did \*not make out the fraud, or show enough to justify the jury in drawing that conclusion. The defendant made no suppression of facts within his knowledge. He stated correctly the circumstances of the connections of *Davis* in *Rhode-Island*. He lived on friendly terms with the plaintiffs; he gave them prompt and seasonable notice of his subsequent opinion of the insolvency of *Davis*; and it did not appear that he had any connection with *Davis*, or that he came and voluntarily recommended him to the plaintiffs. The advice was rash and indiscreet; but there is no ground from which to infer that it was deceitful. *Deceit* is the *gist* of the action. If the cause had gone to the jury, the testimony would not have warranted a verdict for the plaintiffs, and the motion to set aside the nonsuit ought therefore to be denied.

Motion denied. (a)

(a) See *Ward v. Center*, 3 Johns. Rep. 271. *Upton v. Vail*, (6 Johns. Rep. 81,) 3 Term Rep. 51. 2 East, 92. 3 Bos. & Pull. 367.

### RODMAN and others *against* FORMAN, Administrator of FORMAN.

In an action of debt on recognisance of bail, brought against the defendant, as administrator of *Stephen Forman*, deceased. The cause was tried at the *Greene* circuit, the 6th December, 1809, before Mr. Justice *Van Ness*.

[ \* 27 ] The *venue* was laid in *Greene* county, and the declaration stated that the intestate, in his life-time came into the Supreme Court, &c. at *New-York*, &c. "by the \*name of *Stephen Forman*, of *Kortright*, in said county, farmer, and became bail," &c.

Court, and by the name of *S. F. of K* in said county, farmer, became bail, &c. and the *bail-piece* offered in evidence was written, " *Delaware*, ss. *James Haman* is delivered to bail, &c. to *Stephen Forman*, of the town of *Kortright*, in said county, farmer;" and the acknowledgment was taken before a judge of the Court of Common Pleas of *Delaware* county.

The recognisance record, after setting forth the declaration in the original suit, in which the *venue* was laid in *Albany*, states that " *Stephen Forman*, of the town of *Kortright*, and county of *Delaware*, farmer," &c. came into court and became bail, &c.

The admission of this evidence was objected to on the ground of a variance; 1. Because the addition and title by which *Stephen Forman* became bail, as set forth in the declaration, differed from that stated in the recognisance record; 2. Because the declaration stated that the recognisance was taken in this court, and the record produced states it to have been taken before a judge of the *Delaware* court of common pleas. Both the objections were overruled by the judge, and the evidence admitted. The jury found a verdict for the plaintiffs.

A motion was made to set aside the verdict for the misdirection of the judge.

*Foot*, for the defendant.

*Powers* and *E. Williams*, contra.

They cited 1 *Chitty on Pleadings*, 306. 1 *Term Rep.* 235. 285. 5 *Term Rep.* 496. 2 *East*, 452, 502. 5 *Johns. Rep.* 89.

*Per Curiam.* There is no material variance between the declaration and the exemplification of the bail-piece \* and recognisance of bail offered in evidence. The declaration states that the intestate came into the supreme court, by the name of *S. Forman, of Kortright, in said county, farmer*, and became special bail, &c. The bail-piece produced states that the intestate became bail by the name and description of *S. Forman, of the town of Kortright, in said county, farmer*; and the record of the recognisance of bail states that the intestate, *S. Forman, of the town of Kortright, and county of Delaware, farmer*, became bail, &c. The description in the bail-piece corresponds with that in the declaration, except that in the latter the words "*the town of*" are omitted. The sense is not varied, and the description was not set out according to the *tenor*, or *in hac verba*. In *Cumming v. Sibly*, cited by *Buller*, J. in 1 *Term Rep.* 239, the declaration stated the precept to be directed to the *mayor only*, and it was proved to be directed to the *mayor and burgesses*; and the court of K. B. held it sufficient, as the substance was preserved. The bail-piece was the warrant for the recognisance roll, and being attached to it, it formed part of the record, and was evidence of the averment in the pleading.

The second objection is without any weight, for in judgment of law, and according to the form of the record, an intestate came into court and entered bail; and if the evidence be wholly confined to the roll itself, the declaration is supported, for the roll does not pretend to state the precise addition under which the intestate appeared. It designates the place of the

NEW YORK,  
May, 1811.

RODMAN  
V.  
FORMAN.

pleas; and the recognisance roll stated that "S. F. of the town of K. and county of D. farmer," came into court and became bail, &c. It was held, that there was no material variance between the declaration and the bail-piece and recognisance roll, the description in the declaration being set out according to the sense, [ \* 28 ] and not according to the tenor. (a)

(a) But in debt or recognisance of bail, where the judgment against the principal was put in issue by the plea of *not in record*, a variance of six cents between the declaration and the record was held fatal. *Bibbins v. Noxon*, 4 *Wendell*, 207.

NEW-YORK, <sup>May, 1811.</sup> intestate, but does not recite that under that exact description he appeared. The record does not contradict the description in the declaration, and that description might be rejected as surplusage. (2 *East*, 452.)

LEONARD  
v.  
VREDEN-  
BURGH.

The motion on the part of the defendant is, therefore, denied.

Motion denied.

[ \* 29 ]

\*LEONARD *against* VREDENBURGH.

Where *A.* applied to *B.* for goods on credit, and *B.* refused to let him have hem without security, on which *A.* drew a promissory note for the amount, under which *C.* wrote, "I guaranty the above;" and the goods were thereupon delivered. This was held to be a *collateral* undertaking of *C.*; but that there was no necessity for any distinct consideration passing directly between *B.* and *C.* for being all one entire transaction, the delivery of the goods to *A.* supported the promise of *C.* as well as the promise of *A.* And that the words *value received* in the note were sufficient evidence of a consideration on the face of the writing; but if any doubt existed, *parol* evidence was admissible to show the consideration, or that it was one original and entire transaction.

[ \* 30 ]

existed, *parol* evidence was admissible to show the consideration, or that it was one original and entire transaction.

(a)

THIS was an action of *assumpsit*. The declaration contained the usual money counts, the common counts for goods sold and delivered, a count upon a promissory note, and a special count on the following instrument in writing: "November 9, 1808. For value received, I promise to pay *Norman Leonard* five hundred dollars, in sixty days from date, per me, *Moses Johnson*." "I guaranty the above. *Wm. I. Vredenburgh.*" Plea *non assumpsit*.

The cause was tried at the *Onondaga* circuit, before the *Chief Justice*, on the 5th *June*, 1810.

At the trial, the plaintiff proved goods sold and delivered to the defendant, to the amount of 120 dollars and 16 cents. He then offered to prove the written contract above stated, and that *Moses Johnson* applied to him for the goods for which that contract was given, on a credit, but the plaintiff refused to let him have the goods without a previous security for the payment; upon which *Johnson* and the defendant framed and subscribed the contract, as above stated, and presented the same to the plaintiff, who thereupon delivered the goods, to the amount of five hundred dollars. The plaintiff further offered to prove that the defendant, since the delivery of the last mentioned goods, had frequently promised the plaintiff to pay for them, and that *Moses Johnson* was insolvent when the goods were delivered, and has since continued to be insolvent; and that the defendant was and is secured by *Johnson* with property to the amount of one thousand dollars, as an indemnity to him for having signed the contract above mentioned. This evidence was objected to, and overruled by the *Chief Justice*. And the jury, under his direction, found a verdict for the plaintiff, for the amount only of the goods \*proved to have been delivered to the defendant, being 120 dollars and 16 cents.

A motion was made to set aside the verdict and for a new trial, for the misdirection of the judge.

(a) See the cases collected in *Slingerland v. Morse*, 7 *Johns. Rep.* 463, note (a)

*Sill*, for the Plaintiff. 1. The defendant's undertaking was *original*, and not within the statute of frauds. The rule laid down in *Matson v. Wharham*,† "that if the person for whose use the goods are furnished be liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is within the statute of frauds," is not the true rule.

In *Houlditch and others v. Milne*,‡ which was an action of *assumpsit* for the repair of a carriage, which belonged to one *Copsey*, and the bill was made out against him, but before the carriage was delivered, the defendant promised to pay for the repairs, upon which the carriage was delivered; Lord *Eldon* said, "In general cases, to make a person liable for goods delivered to another, there must be an original undertaking by him, so that the credit was given solely to him, or there must be a contract in writing. There might be cases, however, where the rule did not apply." "The plaintiffs had, to a certain extent, a *lien* upon the carriage, which they parted with, on the defendant's promise to pay; that, he thought, took the case out of the statute, and made the defendant liable."

In the case of *Williams v. Leper*,§ the defendant was in possession of certain goods, the property of one *Taylor*, a tenant of the plaintiff; and the landlord coming to distrain, the defendant undertook to pay the plaintiff the *rent in arrear*, if he would desist from distraining. This was held to be an *original* undertaking, and not within the statute of frauds.

The principle to be extracted from the cases decided, seems to be this: that if the property, whether a *lien* or absolute ownership, be parted with, on the faith and \*credit of the defendant's undertaking, it is an original contract, and need not be in writing. Some difficulty has arisen in determining whether the contract is *original* or *collateral*; but this depends on the question, to whom was the credit given?

2. If we are correct, as to the first point, that the true criterion to determine whether the contract was *original* or *collateral*, is to ascertain to whom the credit was given, then the plaintiff should have been permitted to have shown that fact, it being consistent with the written instrument.

There is nothing on the face of the instrument that militates against the alleged fact, that credit was given solely to the defendant. The name of *Johnson* might have been used, at the request of the defendant, to show that the former was liable to refund the money, if paid by the defendant. This form of the instrument might have been chosen, as the shortest and most convenient mode of security for the defendant; or it might have been adopted for the purpose of fraud.

In support of a written contract you may show, by *parol*, any consideration not contradicting the one expressed in writing: and where no consideration is expressed, it may be sup-

NEW-YORK,  
May, 1811.

LEONARD  
v.  
VREDEN-  
BURGH.

† 2 Term Rep.  
30. See also 1  
Hen. Black.

120. Coup. 227.

‡ 3 Esp. Rep.  
86. See also  
Croft v Small-  
wood, 1 Esp.  
Rep. 121.

§ 3 Burr Rep.  
1836. See also  
Keade v. Tem-  
ple, 1 Bos. and  
Pull. 158.

[ \* 31 ]

NEW-YORK, plied by *parol* proof.† So the reason and occasion of making a written contract may be shown by *parol*.‡

LEONARD

v.

VREDEN-  
BURGH.

† *Roberts on Frauds*, 117, note 58, 2 Co.

Rep. 76.

‡ 2 Atkins, 360.

§ 5 East's Rep. 10. See also, *Egerton v. Mat-*

[ \* 32 ]

*thews*, 6 East.

307.

|| 14 Vesey,

jun. 189.

We contend, then, that the plaintiff might show that the consideration of the agreement of the defendant, was the sale of goods on his credit alone, and the occasion of executing the instrument.

3. The consideration of a promise to pay the debt of another need not be in writing.

The first case on this subject is that of *Wain and others v. Warlters*,§ in which it was held, not only that the consideration must be in writing, but that the *agreement* must be signed by both parties. This case has not a binding force or authority here, and it has been denied \*to be law in *England*. In *ex parte Minet*,|| there was a guaranty for the repayment of money lent to a third person, and Lord *Eldon*, in answer to the case of *Wain v. Warlters*, which had been cited by the counsel, to show that the consideration ought to have been stated, as part of the agreement, said, "There is a variety of authorities, directly contradicting the case in the court of K. B. which is a most important case, with reference to the consequences; for the undertaking of one man for the debt of another, does not require a consideration moving between them." And Mr. *Roberts*, in his treatise on the statute of frauds,¶ speaking of the case of *Wain v. Warlters*, says:

¶ *Roberts on Frauds*, 117, note 53.

"According to this doctrine, under that section of the statute, both parties, in most cases, must sign the instrument, otherwise the full consideration for the signing by the party charged will not appear upon the instrument itself; a doctrine rising greatly above the level of antecedent opinions and authorities."

That case certainly subverts the principle of former adjudged cases,†† in which it has been decided that a letter written by the seller of a real estate, a memorandum signed only by the party to be charged, a letter referring for the terms of the contract to a paper in the possession of the defendant, but not signed, were sufficient within the statute.

†† 5 Viner, 527. 9 Vesey,

jun. 351. 7 Vesey,

jun. 265.

2 Bro. C. C.

504. 3 Bro. C.

C. 318.

¶ 1 Binney's Rep. 610. In *Wallace v. Barker*,†† in error, decided in the supreme court of *Pennsylvania*, *Wallace* guarantied to *Barker*, that a certain house should be sold and bring 8,000 dollars, and the difference between 6,000 dollars and that sum should be paid to him; the house having sold for less than 8,000 dollars, the defendant below objected that the agreement was within the statute of frauds, there being no consideration expressed; but this objection was overruled.

¶ 3 Johnson's Rep. 210. In *Sears v. Brink and another*, §§ in this court, the plaintiff had before sold land to *Newkirk*, and the defendants agreed to take his place, and pay to the plaintiff \*the balance due for the land: The counsel for the defendant expressly said, "that it was not an agreement for the debt of another;" and if any thing, it was a contract for the purchase of land. The case is substantial only on the ground of *Newkirk's* not having

signed the contract, so as to bind his interest in the land, or, perhaps, the failure of title in *Sears*. A contract of buying and selling implies, on the face of it,† a consideration; and the sum which *Newkirk* was to pay was referred to, merely to fix the defendant's liability, and not as being the debt of *Newkirk*.

In *Bailey & Bogert v. Freeman*,‡ there was a demurrer to the declaration; and the court decided it on the ground that no consideration for the promise was stated, which was essential in every action on a promise.

The reason of the thing, and the sound construction of the statute, are against the decision in *Wain v. Warlters*. A note or memorandum can mean nothing more than a general outline of the contract, not a complete and perfect contract; and the statute is complied with, though no consideration is expressed. This is confirmed by the observation of Lord *Eldon*, that no consideration passes between the person who undertakes to pay the debt of another and the creditor. It would be very unreasonable to require a consideration to be expressed, when, in fact, there is no consideration. It is sufficient that the agreement, which is to guaranty the debt of another, should be in writing. It is on this ground that part performance is held, by courts of equity, to take a case out of the statute.

4. The defendant being secured, a subsequent promise by him to pay is binding.

Though there is a written contract relative to the subject, parol evidence of a subsequent promise is admissible, if it does not contradict the writing.§ A parol promise collateral to a written agreement is binding.|| A promise by a person who has property of the debtor in his hands, to pay the amount to the creditor, is valid.¶ A government agent having funds in his hands, is liable on his promise to pay for goods furnished.\*\* So an executor, having assets, is liable on an express promise to pay a debt.\*\*

*Sudam, contra.* There are two questions to be discussed; 1. Whether this was an original or collateral undertaking on the part of the defendant; 2. If collateral, whether there is a sufficient writing to take it out of the statute of frauds.

1. In order to determine whether this was a collateral undertaking or not, it must be tested by the rule laid down by Justice *Buller*, in the case of *Matson v. Wharham*, §§ in which all the cases were examined, and the doctrine on the subject fully and clearly established. If the defendant comes only in aid of the person who obtains the goods, so that there is a remedy against both, according to their distinct engagements, then the undertaking is collateral. *Johnson*, who purchased the goods, gave his note for them, on which he is clearly liable. The plaintiff has his remedy against him. The case of

NEW-YORK,  
May, 1811.

LEONARD  
v.  
VREDEN-  
BURGH.

† *Roberts on Frauds*, 116.  
1 *Campbell's N. P.* 242.

‡ 4 *Johnson's Rep.* 220. See also, *Slinger-land v. Morse and others*, 7 *Johnson's Rep.* 463.

§ 8 *Term Rep.* 3,79.

|| 4 *East*, 29.  
[ \* 34 ]

¶ 1 *Roll. Abr.* 27.

\*\* 1 *East*, 135.  
†† *Coup.* 184.

§§ 2 *Term Rep.* 80. 1 *Salk* 27.

NEW-YORK,  
May, 1811.

LEONARD  
v.  
VREDEN-  
BURGH.

† *Copw. 827.*

† *Roberts on  
Frauds, 216.*

§ 1 *Bos.* &  
Pull. 158.  
[\* 35]

*Jones v. Cooper*,† as stated by Justice *Buller*, in *Matson v. Wharham*, was where a person going abroad requested a baker to supply his mother-in-law with bread during his absence, and he would see him paid. This was held by the whole court of K. B. to be a *collateral* undertaking. These cases are much stronger than the one before the court; and it makes no difference whether the promise is made before or after the delivery of the goods. The point is, whether the party benefited by the promise is liable at all; if he is liable, then the promise is collateral.†

In the case of *Williams v. Leper*, and *Houlditch and others v. Milne*, which have been cited, a *lien* was given up, on the promise of a third person, which made it an original undertaking. In *Keate v. Temple*,§ a new trial \*was granted, because the court were of opinion that there was no reasonable ground to suppose that the credit was given to the lieutenant of the ship.

2. Then taking this to be a collateral undertaking, must not the whole *agreement*, which includes the consideration of the promise, be in writing? The case of *Sears v. Brink* was the first decision, in our courts, on this point; though it had been before settled in *England*. In *Bailey & Bogert v. Freeman*, the court confirmed the principle of the decision in *Sears v. Brink*.

The chancery decisions are of no authority. Cases of part performance, or as to the execution of a parol agreement admitted by the party, are not admitted or discussed at law. And || 2 *Hen. Bl.* 63. 68. Lord *Loughborough*, in *Rondeau v. Wyatt*,|| expressed his disapprobation of the laxity introduced into the court of chancery, in regard to the statute of frauds. And in *Whitchurch* v. *Bevis*,|| Lord *Thurlow* struggled hard against the doctrine before held in some of the chancery cases. In the very able opinion delivered by Lord Chief Baron *Skynner*, in the house of lords, in the case of *Rann v. Hughes*,†† it is laid down, as clear and established law, that no agreement, whether in writing or not, unless a specialty, could be maintained, without a sufficient consideration was shown; that a *nudum pactum* might exist, whatever might be the rule of the civil law, in writing, as well as without writing.

¶ 2 *Bra. C.* C. 566. || 2 *Term Rep.* 350, in a note. It is the established and invariable mode of expression used by all the writers in their readings on the statute of frauds, that the statute has not altered the common law, but that it has merely prescribed a new mode of proof: that is, the *parol* proof which was requisite to support the action, must now be produced in *writing* at the trial. It is on this ground that the court, after verdict, will presume the promise stated in the declaration to have been in writing. Admitting, says Baron *Skynner*, in *Rann v. Hughes*, all that is stated in the declaration to have been reduced to writing, and so proved, it does not help the promise, \* for there must be a consideration, in

30

addition; and in that case, all the judges concurred with him in the opinion, that there was not a sufficient consideration to support the demand, and its being supposed to be in writing made no difference. Could the plaintiff, before the statute, have recovered against the defendant, on proving merely a *guaranty* in writing, without the additional facts offered to be proved by *parol*? Certainly not. It follows, then, according to the authorities cited, that to entitle him to recover now, he must prove those facts, or a consideration, in writing.

Suppose an account stated with an executor, and at the bottom of the account he writes, "I promise to pay the above 250 pounds," is the executor to be charged out of his own estate, if the plaintiff can prove at the trial, by *parol*, that the written promise was in consideration of a forbearance to sue for six months? Is not the *forbearance* the agreement on which the promise is founded? And is there not as much danger of perjury in proving the consideration, as the promise? If a consideration is essential to an agreement, and that may be proved by *parol*, why cannot the plaintiff recover, for the same reason, where the *consideration* is in writing, and the *promise* is *parol*?

As to the observation of Lord *Eldon*, in the case *ex parte Minet*, that "the undertaking of one man for the debt of another does not require a consideration moving between them;" if his lordship meant, that as between the original debtor and the person making the promise, there need be no consideration, he was, no doubt, correct; for that is what no person has ever pretended; but if he meant to say, that a promise to pay the debt of another, without consideration, was good, then he is contradicted, not only by a "variety of cases," but by every case on the subject. But the case then before his lordship did not come within the statute, and might be supported, without subverting the decision of the court of K. B. in *Wain v. Warlters*; for there was a sufficient consideration \*expressed, namely, receiving one month's notice in writing. The court are not to say what the consideration must be; for if any consideration appear on the face of the contract, though it may not have been the only inducement to the promise, yet it may be sufficient to support the undertaking.

KENT, Ch. J. delivered the opinion of the court. The testimony offered at the trial was rejected, because the consideration for the promise was not stated in the writing produced. The case appeared to me then to be governed by the decision in *Wain v. Warlters* (5 *East*, 10), which was recognised by this court, in *Sears v. Brinks* (3 *Johns. Rep.* 210); but upon better reflection, I now think that the plaintiff ought to have recovered upon that contract.

There is no doubt that this was a collateral undertaking, within the purview of the statute of frauds; for *Johnson's* note is conclusive proof that credit was given to him, and that

N. Y. W. Y. O. R. K.,  
May, 1811.

LEONARD  
V.  
VREDEN  
BURGH.

[ \* 37 ]

NEW-YORK, he was liable to the plaintiff. If the whole credit is not given to the person who comes in to answer for another, his undertaking is collateral. (6 *Mod.* 249. 2 *Term Rep.* 80.)

May, 1811.  
LEONARD  
v.  
VREDEN-  
BURGH.

I have not been altogether satisfied with the decisions referred to, but it appears to me, that the present motion can be determined in favour of the plaintiff, without disturbing them; and, perhaps, the examination which I may give to the cases upon the statute of frauds, may help to illustrate the reasonableness of those decisions.

If we admit the origin of the contract to be such as the plaintiff offered to show, there was no necessity for, nor was there, in fact, any consideration passing directly between the plaintiff and defendant, and, of course, none was to be proved. It was all one original and entire transaction, and the sale and delivery of the goods to *Johnson*, supported the promise of the defendant, as well as the promise of *Johnson*. If the contract between \* *Johnson* and the plaintiff had been *executed* and perfectly *past*, before the defendant was applied to, so that his promise could not connect itself with the original communication, then the case would have been very different, and the undertaking of the defendant would have required a distinct consideration. A mere naked promise to pay the already existing debt of another, without any consideration, is void. But in the present case, (as the plaintiff offered to show) the promise was made at the time of the original negotiation between the plaintiff and *Johnson*. It was incorporated with that contract, and became an essential branch of it. The whole was one single bargain, and the want of consideration, as between the plaintiff and defendant, cannot be alleged. If there was a consideration for the entire agreement, (and *Johnson*'s note purporting to be given for value received, was evidence of it, *that* consideration was the aliment for the defendant's promise. This is the amount of the doctrine in *Kirby v. Coles* (*Cro. Eliz.* 137), and it is alluded to in *Tomlinson v. Gill* (*Amb.* 330), and *Williams v. Leper* (3 *Burr.* 1886); and to this extent I can understand the observation of Lord *Eldon* (14 *Vesey*, 190), when he observes, that, "the undertaking of one man for the debt of another does not require a consideration moving between them." In *Wain v. Warlters*, the promise of the defendant was not made at the time, nor did it form a part of the original contract between the creditor and the third person. It was made long after the debt had been created, and, therefore, in that case, the promise required something more to support it than the mere fact of the liability of the person for whom the defendant assumed. That fact alone would have left the promise a nude pact. It required, at least, the consideration of forbearance, or some other consideration, arising out of, and founded upon, the original liability. The same remark applies to the case of *Sears v. Brink*. But if a promise to pay the debt of another \* he

[ \* 38 ]

32.

[ \* 39 ]

founded on a new and distinct consideration, independent of the debt, and one moving between the parties to the new promise, it is not a case within the statute. It is considered in the light of an original promise. The cases of *Tomlinson v. Gill*, and *Williams v. Leper*, proceed upon this distinction, and the point is too clearly settled to be questioned. (*Roberts on Frauds*, 232 to 237.)

NEW-YORK,  
May, 1811.

LEONARD  
v.  
VREDEB-  
URGH.

There are, then, three distinct classes of cases on this subject, which require to be discriminated: 1. Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. Here, as we have already seen, is not, nor need be, any other consideration, than that moving between the creditor and original debtor. 2. Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. Here must be some further consideration shown, having an immediate respect to such liability, for the consideration for the original debt will not attach to this subsequent promise. The cases of *Fish v. Hutchinson* (2 *Wils.* 94), of *Charter v. Beckett* (7 *Term. Rep.* 201), and of *Wain v. Warlters*, are samples of this class of cases. 3. A third class of cases, and to which I have already alluded, is when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties.

The two first classes of cases are within the statute of frauds, but the last is not. (1 *Saund.* 211, note 2.) The case before us belongs to the first class; and if there was no consideration other than the original transaction, the plaintiff ought to have been permitted to show that fact, if necessary, by parol proof; and the \*decision in *Wain v. Warlters* did not stand in the way. The whole *agreement* between the plaintiff and defendant, consisted in the promise to guaranty the debt of *Johnson*. To say that the promise is void, for want of disclosing a consideration, is assuming what the plaintiff offered to show ought not to be assumed, for there was no distinct consideration passing between the plaintiff and the defendant. *Johnson's* note given for value received, and, of course, importing a consideration on its face, was all the consideration requisite to be shown. The paper disclosed that the defendant *guarantied* this debt of *Johnson*; and if it was all one transaction, the value received was evidence of a consideration embracing both the promises. The writing imported, upon the face of it, one original and entire transaction; for a *guaranty* of a contract implies, *ex vi termini*, that it was a concurrent act, and part of the original agreement. In *Stadt v. Lill* (9 *East*, 348), the defendant gave a *guaranty* in this

NEW-YORK  
May, 1811.

HART  
v.  
CLEIS.

form: "I guaranty the payment of any goods which *Stadt* delivers to *Nichols*;" and the K. B. held that "the stipulated delivery of the goods to *Nichols* was a consideration appearing on the face of the writing, and when the delivery took place, the consideration attached." The writing in the present case was of equivalent import and effect. Instead of saying that he guarantied the payment of goods delivered to *Johnson*, the defendant guarantied the payment of the *value received* by *Johnson*.

Upon the whole, we think that the plaintiff was entitled to recover, upon production and proof of the writing. But if there was any doubt upon the face of the paper, whether the promise of *Johnson* and that of the defendant were or were not concurrent, and one and the same communication, the parol proof was admissible to show that fact.

A new trial ought, therefore, to be awarded, with costs to abide the event.

New trial granted

[ \* 41 ]

\*HART, *qui tam, against CLEIS.*

In an action  
*qui tam*, on the  
6th section of  
the act concerning  
slaves, (24th  
sess. c. 188,) it  
was held, that  
the *exception* in  
(a) *R. S. 658,*  
sec. 12.

the clause was  
matter of ex-  
cuse to the de-  
fendant, and  
need not be  
negatived by  
the plaintiff in  
his declaration.  
(b). That part  
of the *sixth* sec-  
tion of this act,  
which declares  
that "the slave  
exported or at-  
tempted to be  
exported, shall  
be free," does  
not operate, un-  
less the master  
or owner is con-  
cerned in the  
exportation;

but in case of  
a stranger, or  
third person  
acting without  
the knowledge

IN error, from the court of common pleas of *Ontario* county.

This was an action of *debt* for the penalty of 250 dollars, given by the 6th section of the act concerning slaves and servants, passed the 8th of *April*, 1801, (24th sess. c. 188, (a). The declaration stated that the defendant took, imprisoned, and carried away, a black man named *Bazil Baker*, being a slave, and kept him in irons, during three days, with the intent to export him out of the state; and that the defendant did intend to export him out of the state, contrary to the statute in such case made and provided; by reason whereof, &c. There was a special demurrer to the declaration, and the following causes were assigned:

1. That the declaration does not allege upon what act of legislature, if any, the right of action is founded.
2. That it is not alleged that the defendant, in attempting to export the slave, acted contrary to the provisions of the act.
3. That it is not alleged that *Baker* was a slave who was not liable to be lawfully exported out of the state.

On this demurrer, the court below gave judgment for the defendant, on which a writ of error was brought to this court

*Rodman*, for the plaintiff in error, observed, that he understood the special causes of demurrer were waived, and that

(b) *Vid. United States v. Hayward, 2 Gallis. 485*

the defendant relied on the general objection, as a substantial defect in the declaration, that it does not negative the exceptions and provisos in the act. The 6th section of the act declares, "that if any person shall \*export, or attempt to export, any slave or any servant born of a slave, and made free by virtue of the act, to any place without this state, except as is hereinafter provided," &c., and the next section provides, that persons travelling or removing from the state may take their slaves, &c.

The general rule was laid down in *Bennet v. Hurd*,† that where the *proviso* forms no part of the plaintiff's title, but merely furnishes matter of excuse to the defendant, it need not be negatived by the plaintiff.

*Sedgwick*, contra. In the present case, the exception or proviso is incorporated, and makes part of the sixth section, on which the action is brought, and ought, therefore, to have been negatived.

Serjeant *Williams*,‡ lays it down, as a settled rule, that in an information on a penal statute, where there is an exception in the enacting clause, of persons acting under particular circumstances, it is necessary to state that the defendant is not within the exception.§ In *King v. Pratten*,|| it was admitted to be clear law, that where the exception is in the enacting clause, it must be negatived, as well as the exception contained in a former clause referred to by the enacting clause.

But there is another objection equally fatal. No person but the master of the slave can be liable for the penalty, under this act; for the penalty is not only the forfeiture of 250 dollars, but that the slave so exported or attempted to be exported, shall be free. Now the latter penalty implies that it must be the master or owner of the slave, or some person with his privity or consent; otherwise this manifest injustice would follow, that if a stranger, without the knowledge of the master, should export, or attempt to export the slave, the master would be deprived of his property. He would suffer a penalty, though he had not offended the law. He would be punished \*because another had violated his property and the laws of the state. Every judgment on the statute involves the freedom of the slave; and must, therefore, have reference only to the master.

*Rodman*, in reply, observed, that the rule had been repeatedly laid down by the court, and was clearly stated in the case of *Teel v. Fonda*,¶ that where the proviso or exception was matter of defence or justification to the defendant, it must be pleaded, and need not be negatived by the plaintiff.

As to the other objection, if the construction contended for by the defendant is to prevail, the statute will be, in a great measure, defeated. The words of the act are general: "if

NEW-YORK,  
May, 1811.

HART  
v.  
CLEVIS.

[ \* 42 ]

of the owner of  
the slave, the  
only penalty is  
the forfeiture of  
250 dollars.

† 3 Johnson's  
Rep. 438. See  
also 1 Johns.  
Rep. 553.

† 1 Sand. 262  
a. in a note.

§ 1 Str. 49.  
2 Lord. Raym  
1386.  
|| 6 Term Rep  
559. 1 Lord  
Raym. 119.

[ \* 43 ]

¶ 4 Johns. R.  
304.

NEW-YORK,  
May, 1811.

HART  
v.  
CLEIS

any person" shall export, &c. It extends to strangers or third persons, as well as to masters or owners of slaves. That construction ought to be adopted, which accords with the manifest intent of the legislature, and which will give effect to the statute.

(a) R. S. ut  
sup.

*Per Curiam.* The action below was brought for a penalty incurred under the 6th section of the *act concerning slaves and servants*. (*Laws*, vol. 1, 612) (a). The special causes of demurrer stated upon the record, are not material; but the defendant relies upon what he alleges to be defects, in substance, in the declaration, viz. that the plaintiff does not negative the excepted cases in the section, and that he does not aver that the defendant was master of the slave, or acted with his privity.

[ \* 44 ]

It is a sufficient answer to the first objection, that the exception forms no part of the plaintiff's title or right of action, but is merely matter of excuse for the defendant. The excepted cases are not incorporated into the body and substance of the enacting clause; but are given as exceptions, and the instances are not specified in that, but in the subsequent section. The law on this subject has \* been repeatedly declared by this court. (3 *Johns. Rep.* 438. 4 *Johns. Rep.* 304.) It is evident, from a view and comparison of the 6th and 7th sections of the act, that this case falls within the reason of those decisions; that the excepted cases are more instances of excuse to a party who takes a slave out of the state. Nor does there appear to be decisive weight in the other objection; for the words of the act are, "that if *any person* shall export, or attempt, &c. he shall forfeit," &c. The doubt has been created by the last words, "and the slave so exported or attempted to be exported, shall be free." This clause cannot operate, unless the master be concerned in the exportation; for to attach it to the conviction of a stranger, without the knowledge or privity of the master, would be depriving the master of his property unjustly. And, on the other hand, to confine the penalty to the act of the master only, would be contrary to the letter and spirit of the act, and would go in a great measure to destroy the effect of the provision. By applying the penalty to every person offending, and by restricting the enfranchisement of the slave to cases of offence by the master, the act will operate with efficacy and with justice; and it is the duty of the courts so to construe statutes, as to meet the mischief, and to advance the remedy, and not to violate fundamental principles.

For these reasons, the judgment below ought to be reversed.

## MATHER against HOOD.

NEW-YORK,  
May, 1811.MATHER  
v.  
HOOD.

THIS was an action of trespass, assault and battery, and false imprisonment. The cause was tried before \*the *Chief Justice*, at the *Seneca* circuit, the 20th *June*, 1810.

At the trial, the plaintiff, to support the action, called the sheriff of the county of *Seneca*, as a witness, who testified, that by virtue of a *mittimus*, issued under the hand and seal of the defendant, a justice of the peace of the county, and by the command of the defendant, he arrested the plaintiff and detained him in custody, until he had paid ten dollars, as stated in the plaintiff's declaration. The *mittimus* was as follows: " *Seneca* county, ss. *John Hood*, one of the justices, &c. to the keeper of the gaol, &c. Whereas, upon complaint made unto me, this present day, by *Elijah Hartshorne*, of the town of *Fayette*, in said county, I, the said *John Hood*, Esquire, justice as aforesaid, went immediately to the messuage, tenement, and possession of the said *Elijah*, at the town of *Fayette* aforesaid, in the said county, and there found *Zechariah Mather*, *Eleazer P. Mather*, *David Dumond*, *James Huff*, *William Updike*, and *Daniel Tucker*, of the said town of *Fayette*, forcibly, with strong hand and armed power, holding the said tenement, messuage, and possession, against the peace of the said people, and against the form of the act in such case made and provided. Therefore, I, the said justice, do send you, by the bringers hereof, the bodies of the said *Zechariah*, *Eleazer*, *Lucius*, *David*, *James*, *William*, and *Daniel*, convicted of the said forcibly holding by my own view, testimony, and record, commanding you in the name of the people of the state of *New-York*, to receive them the said *Zechariah*, *Eleazer*, *Lucius*, *David*, *James*, *William*, and *Daniel*, into the said gaol of our said county, and there safely to keep them, and every of them respectively, until they shall have respectively paid the several sums of *ten dollars*, each of good and lawful money of the state of *New-York*, to the said people, which I the said justice have set and imposed upon each and every of them separately, for a fine and ransom for their said trespasses \*respectively. Herein fail you not at the peril that may thereof ensue," &c.

The defendant then produced and read in evidence, a record of his proceedings, under the act to prevent forcible entries and detainers, passed 6th *February*, 1783 (11 sess. c. 6), as follows: " *Seneca* county, ss. Be it remembered, that on the 2d day of *August*, in the year of our Lord eighteen hundred and nine, at the town of *Fayette*, in the county of *Seneca* aforesaid, *Elijah Hartshorne* complains to me,

[ \* 45 ]  
The record  
of conviction  
by a justice un-  
der the act to  
prevent forcible  
entries and de-  
tainers, (11th  
sess. c. 6,) is  
not traversable,  
and if it shows  
that the justice  
had jurisdiction,  
and proceeded  
regularly, it is con-  
clusive; and a  
bar to any suit  
brought against  
the justice. (a)

[ \* 46 ]

(a) *Vid. Wood v. Peake*, *infra* 69. An action will not lie for official misconduct in a judicial officer, though of special and limited jurisdiction, and though such misconduct be corrupt and malicious, if a statute declare his own record to be conclusive evidence in all courts, of the facts therein contained. *Cunningham v. Bucklin*, 8 *Cowen*, 178.

NEW-YORK,  
May, 1811.

MATHER  
v.  
HOOD.

[\* 47]

*John Hood, Esq. one of the justices of the people of the State of New-York assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, that Zechariah Mather, Eleazer P. Mather, Lucius Mather, David Dumond, James Huff, William Updike, and Daniel Tucker, of the said town of Fayette, into the meassuage of him the said Elijah, in and upon certain tenements, and possessions, situate in the said town of Fayette, did enter, and him the said Elijah from the messuage, tenement, and possession aforesaid, whereof the said Elijah at the time of the entry aforesaid was seized and possessed, unlawfully ejected, expelled, and amoved, and the said messuage, tenement, and possession, from him the said Elijah, unlawfully, with strong hand and armed power, do yet hold, and from him detain, against the form of the act in such case made and provided. Whereupon the said Elijah, then, to wit, on the said second day of August, at the town of Fayette, aforesaid, prays of me, so being a justice as aforesaid, to him in this behalf, that a due remedy be provided, according to the form of the act aforesaid, which complaint and prayer by me the said justice being heard, I, the said John Hood, Esq. justice as aforesaid, to the said tenement, messuage, and possession have come, do then and there find and see the aforesaid Zechariah Mather, Eleazer P. Mather, Lucius Mather, David Dumond, James Huff, William Updike, \*and Daniel Tucker, the aforesaid messuage, tenement, and possession, with force of arms unlawfully, with strong hand and armed power, detaining, against the form of the act in such case made and provided, according as he the said Elijah, so as aforesaid, hath to me complained. Therefore, it is considered by the said justice, that the aforesaid Zechariah Mather, Eleazer P. Mather, Lucius Mather, David Dumond, James Huff, William Updike, and Daniel Tucker, of the detaining aforesaid, with strong hand, by my own proper view, then and there as aforesaid had, are convicted, and every of them convicted, according to the form of the act aforesaid. Whereupon, I, the said justice, upon every of the aforesaid Zechariah Mather, Eleazer P. Mather, Lucius Mather, David Dumond, James Huff, William Updike, and Daniel Tucker, do set and impose severally, a fine of ten dollars, of good and lawful money of the State of New-York, to be paid by them, and every of them severally, to the said people of the State of New-York, for their said offences: and do cause them and every of them to be taken and arrested. And the said Zechariah, Eleazer, Lucius, David, James, William, and Daniel, being convicted, and every of them being convicted, upon my own proper view of the detaining aforesaid, with strong hand as aforesaid, by me the said justice are committed, and every of them is committed, to the common gaol of the said county of Seneca,*

in the town of *Ovid*, being the next gaol to the messuage aforesaid, there to abide respectively, until they shall have paid their several fines respectively to the people aforesaid, concerning which the premises aforesaid, I make this my record. In witness whereof, I, the said *John Hood*, Esq. the justice aforesaid, to this record my hand and seal do set, at the town of *Fayette* aforesaid, in the county aforesaid, on the second day of *August*, in the year of our Lord one thousand eight hundred and nine."†

NEW-YORK,  
May, 1811.

MATHER  
v.  
HOOD.

† Sec. 3 Ld.  
Raym. 360.  
[ \* 48 ]

\*The plaintiff then offered to prove, that he had been in possession of the premises mentioned in the record, for a long time previous to the 2d of *August*, 1809, and that he entered into and retained possession of the premises; in a lawful and peaceable manner; that at the time of the arrest, he, and the other persons named in the record, were peaceably and quietly gathering the harvest of grain, belonging to the plaintiff, on the premises; that the defendant imposed the fines mentioned in the record without *view*, and upon the mere complaint of *Hartshorne*, who had never been in possession of the premises mentioned in the record. This evidence was objected to by the defendant's counsel, and rejected by the judge; and the jury, under his direction, found a verdict for the defendant.

It was agreed that either party might turn the case into a special verdict.

A motion was made to set aside the verdict, and for a new trial.

*E. T. Throop*, for the plaintiff. 1. If there was no *force* in this case, the justice had no jurisdiction. He is bound, therefore, to show an actual forcible entry. The statute (11 sess. c. 6.) speaks of "an entry by strong hand, and with a multitude of people;" and that when *such forcible entry* is made, and complaint is made to a justice, he shall go to the place, &c. Courts of special jurisdiction are limited as to *place*, *persons*; and the *subject matter* of their jurisdiction; and if they give judgment in other matters, it is void as *coram non judice*; as where, in the case put in *Perkins v. Proctor*,† they should adjudge *rose water* to be *strong water*. So in the present case, if the justice adjudges it to be a *forcible entry*, when there is *no force*, it is *coram non judice*, and the justice is liable for acting without his jurisdiction. To permit a justice under a mere pretence of a forcible entry, \*to imprison a citizen, is against the constitution, as well as the principles of law. It could never be the intention of the framers of the constitution, or of the legislature, to permit a justice to assume and exercise such an arbitrary power. A justice is bound to show the regularity of his proceedings, otherwise he is liable to an action of trespass and false imprisonment.||

† 3 Wils. 313,  
385.

[ \* 49 ]

Again, these proceedings before the justice were summary, and the plaintiff could have no opportunity to plead to the

|| 1 Str. 710,711

NEW-YORK, jurisdiction of the justice. He ought, therefore, to be allowed to contradict the record, by showing that, in fact, the justice had no jurisdiction.

MATHER  
v.  
Hoon.

4 B. Comm.  
283.

2. The conviction was informal. It does not state that a complaint was made to the justice *on oath*. Though the statute is silent in this respect, yet it is a universal principle, in all proceedings of a criminal nature, that the complaint, or foundation of the proceeding, should be made under oath.†

*Rodman*, contra. I agree that it must appear that the justice had jurisdiction. The only difference between the counsel is, how this is to be made to appear. If there has been a conviction, I contend, it must appear from the record of that conviction. The statute relative to forcible entries is copied from the *English* statutes. The justice has jurisdiction in all cases of a complaint of a forcible entry. He is required to go to the place, and on view, he is to record such force, and to impose a fine on the offender. The record thus made, according to the directions of the act, is conclusive evidence of the fact of a forcible entry, and cannot be traversed.‡

† 1 Hawk. Pl.  
C. c. 64. s. 8. 2.  
Ld. Raym. 1516.  
|| 2 Burn's Just.  
179, 180.  
§ 1 Ld. Raym.  
451. 1 Salk.  
396. 5 Johns.  
Rep. 295.

The form of the conviction is correct, according to the established precedents.||

In *Groenwelt v. Burwell*, § Holt, Ch. J. held, that if a justice of the peace should record that, upon view, as a force, which was no force, he could not be drawn in question, for it is a *judicial* act.

¶ Coup. 640,  
642.

\**Hildreth*, (Att. Gen.) in reply, said, that it was competent to the plaintiff, in this action, to show that the proceedings of the justice were not regular; or the justice, in order to make out his defence, must show that they were regular. In *Cripps v. Durden*, ¶ it was laid down, as a settled point, that in all actions against justices of the peace, they must shew the regularity of their proceedings; and *Buller* stated a number of cases, in which it had been so decided, and the conviction held void.

¶ B. 1 c. 64. s.  
38, 40.

Then was this conviction regular? The complaint on which the justice proceeded was not made on oath. No person can be brought to answer for a criminal charge, unless upon a complaint made on oath. And this is more particularly requisite in a case of this kind, where the party complaining is the party interested or dispossessed. *Hawkins*† says, it must appear that the party complaining was *in possession* of an estate, and it must be also shown that the entry on such possession was *forcible*.

*Per Curiam*. The defendant at the trial justified under a record of his proceedings, by virtue of the *act to prevent forcible entries and detainers*. The first section of the act (Laws, vol. 1, 101,) gives power to any justice of the peace, upon complaint, to go to the place where the force is made, and record the force, and set a fine not exceeding 5l. upon

each offender, and to commit them to gaol until the fine be paid. This section was taken literally from the statute of 15 Rich. II. c. 2.; and the *English* decisions upon that statute are applicable to this case. The defendant acted under the authority given by the first section of the act, and the record shows that he proceeded correctly. The question is, whether that record is traversable.

The form of the record is agreeable to established precedents. (*King v. Elwell and others*, 2 Lord *Raym.* 1514. 3 *Id. Raym.* 360. 2 *Str.* 794. *Burn's Justice*, tit. *Forcible Entry and Detainer.*) The act is explicit, that one justice is competent to record the force and to convict; and the decisions are uniform that the record is not traversable, because the justice, in making it, acts not as a minister, but as a judge. It is as strong and effectual as if the offender had confessed the force. (8 *Co. 121*; a. *Hawk.* b. 1. c. 64. s. 8.) The proceedings under this first section are distinct and independent of those prescribed by the subsequent sections; and so it was understood by this court in the case of *The People v. Anthony* (4 *Johns. Rep.* 198); and when the record shows that the justice had jurisdiction, and that he proceeded regularly, it is conclusive. The case of 9 *Edw. IV.* 3 pl. 10, and the opinion of the court of king's bench, in *Groenveld v. Burwell*, as reported in 1 *Stilk.* 396, prove that the justice is not responsible by suit for the proceeding; because it is a judicial act. Whether it is wise or expedient to leave such summary power in the hands of a single magistrate, is a question for the legislature, and not for the courts of justice. It is sufficient for us that an existing statute gives this power; and that, according to settled principles of law, a record of such proceeding which is regular and correct upon the face of it, cannot be questioned or traversed in a collateral action. It is a full and complete bar to any suit against the magistrate.

The motion on the part of the plaintiff ought, therefore, to be denied.

Motion denied. (a)

(a) See the proceedings in *Forcible Entry and Detainer* under the provisions of the Revised Statutes. 2 R. S. 507—511.

#### \*BEALLS against GUERNSEY.

[ \* 52 ]

THIS was an action of *trespass*, against the defendant, late sheriff of *Ontario*, for taking, carrying away, and disposing of seventy-three barrels of whiskey, &c.

The defendant pleaded the general issue, with notice of a justification.

Where a sheriff justifies under a *feri faci* *et*, it is not necessary that he should show that it is return

NEW-YORK,  
May, 1811.

BEALLS  
v.  
GUERNSEY.

ed, nor will the want of an endorsement on the execution of the time it was received by the sheriff, render it inadmissible in evidence; for the statute is merely directory to the sheriff, on this point; and the time of receiving it may be shown by *parol proof*, or otherwise.

The cause was tried before the *Chief Justice*, at the *Ontario* circuit, the 26th *June*, 1801. The plaintiff stated that he purchased the whiskey of *Moses Johnson*, on the 26th *August*, 1807; and the same was deposited in the cellar of *Ezekiel Taylor*.

The defendant then produced in evidence the record of the judgment, in this court, by confession, against *Moses Johnson*, in favor of *William W. Rodman*; and then offered in evidence an *alias testatum fieri facias* issued on the judgment against *Johnson*, dated the 15th *August*, 1807, and returnable the second *Monday of November*, 1807; but the plaintiff's counsel objected to this evidence, because the *test. fi. fa.* had not been returned and filed in the clerk's office, nor was there any endorsement thereon of the day it was received by the defendant or his deputy, nor was there any return endorsed upon it, or any thing by which it could appear that the property of *Johnson* had been taken and sold by virtue of the execution. The judge rejected the evidence of the *test. fi. fa.* The defendant then offered to prove that the *test. fi. fa.* was in his hands, as sheriff of the county of *Ontario*; between the *teste* and return day thereof; and that by virtue thereof, he, as sheriff, took the whiskey in question, as the property of *Moses Johnson*; but this evidence was rejected; and the jury, under the direction of the judge, found a verdict for the plaintiff for 1,690 dollars and 91 cents.

[ \* 53 ].

\*A motion was then made to set aside the verdict and for a new trial, for the misdirection of the judge.

*Rodman*, for the defendant, said, that the only question was, whether the *alias test. fi. fa.* ought not to have been received in evidence. He contended that it was not necessary to show that the execution had been returned. In *Rowland v. Veale*,<sup>†</sup> the distinction was laid down between *mesne* process, and process of execution; and that it was not necessary to show a return of the latter.

<sup>†</sup> *Coup. 18, 10.  
East, 82, 6 Co.  
90.*

<sup>‡</sup> *2 R. S. 364,  
§. 10.*

Though by the 7th section of the statute, (24 sess. c. 105<sup>‡</sup>) the sheriff and his under officers are required to endorse on all writs of execution the day when they are received; yet it was immaterial, in the present case, and not a sufficient reason for rejecting the evidence. The reason of the requisition is to ascertain which of several executions has a preference, or first binds the property.

<sup>||</sup> *1 Dakk. 409, 1.  
Ld. R. ym. 532.  
§ C.*

*Sedgwick*, contra. The reason for showing a return of final process seems equally strong as that for showing the return of *mesne* process. In *Freeman v. Blewitt*,<sup>||</sup> *Holt*, Ch. J., lays it down, as a general and settled rule, that where a principal officer justifies under a returnable writ, he must show that it was returned; and that a sheriff cannot justify under a

*fieri facias* without showing a return. The same rule was laid down by the Ch. J. in *Middleton v. Price.*†

NEW-YORK,  
May, 1811.

PHELPS  
v.  
JOHNSON.

2. The direction of the statute is positive that the time of receiving the execution shall be endorsed by the sheriff; and the reason has been stated, that it might appear which of the several executions had the preference. It was the duty of the sheriff to make this endorsement; and he cannot justify himself when he has omitted to perform his duty; nor can he take advantage of his own wrong. It did not appear but that this execution had been just issued from the clerk's office. To show that he *\*had* acted upon it, there should have been an endorsement by the sheriff.

† *Wilson*, 17, 2.  
*Roll. Abr.* 560,  
s. 18, 8, 9, 10.  
*Brooke, Tresp.*  
211. *Moore*, 56

[ \* 54 ]

*Per Curiam.* The later authorities, (*Cowp.* 18, 10, *East*, 73) do not require the sheriff to show a *fi. fa.* returned, when he justifies under it: because an execution is good and effectual without ever being returned. It was formerly understood otherwise, according to the opinion of *Kingsmill*, J. in 21 *Hen.* VII. 22. b., and of Lord *Holt* and the rest of the judges of the K. B. in *Freeman v. Blewitt*, 1 *Salk.* 409. But the recent decisions are founded on better reason, and ought to govern. Nor did the want of an endorsement upon the execution, of the time of receiving it, render it inadmissible in evidence. The statute requiring the sheriff to endorse the time, was merely directory to the officer, for the sake of greater certainty; and the omission to do it will not preclude the sheriff from showing the time by parol proof. It may turn every presumption, arising from doubt as to the precise time, against him; but it will not absolutely shut out other proof.

The verdict must be set aside, and a new trial awarded, with costs to abide the event.

New trial granted.

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PHELPS, Administrator of PHELPS, against I. and O. JOHNSON.

THIS was an action of debt, to recover the amount of three sealed notes, dated the 14th of *February*, 1798, \*and payable before the 28th *June*, 1806. The defendants pleaded, 1. *Non est factum*; 2. *Payment*; 3. A release on the 28th *June*, 1806.

The cause was tried before the *Chief Justice*, at the *Ontario* circuit, the 26th of *June*, 1810.

At the trial, the plaintiff proved the execution of the notes, and that they were assigned to *Henry Remsen*, on the 3d *May*, 1805, and that this suit was brought for his benefit. The defendant then offered in evidence an agreement, under

Where A. and B. gave a sealed note to C. and A. afterwards gave a bond and mortgage to C. for the amount due on the note, and C. covenanted to procure and cancel the note, it was held that, though the bond

NEW-YORK,  
May, 1811.

PHELPS  
v.  
JOHNSON.

and mortgage  
were not an  
extinguishment  
of the note, yet  
the covenant  
made with A.  
was for the  
benefit of A.  
and B. and a  
covenant not to  
sue, which a-  
mounted to a  
release of the  
note. (a)

seal, dated the 28th June, 1806, between *Oliver Phelps*, the intestate, and *Isaac Johnson*, one of the defendants, which stated, that whereas the said *Phelps* had that day conveyed to the said *Johnson* part of a lot of land, No. 35, in township No. 9, in the 5th range of townships, in *Ontario* county, being the east half of the said lot, supposed to contain 185 acres and three-fourths; and if on an accurate survey the said land should fall short of the said quantity, the said *Phelps* agreed to refund to the said *Johnson*, for every acre so deficient, the sum of 5 dollars, with interest from the date; and that in case it exceeded the said quantity, the said *Johnson* agreed to pay to the said *Phelps* 5 dollars for every acre of such excess, with interest, &c.; and the said *Johnson* further agreed to procure and give up to the said *Phelps*, the articles of agreement executed between the said *Phelps* and the said *Isaac Johnson* and *Otis Johnson*, for the said land; and the said *Phelps*, the intestate, further agreed to procure and cancel the notes given to him by the said *Isaac* and *Otis Johnson*, for the original purchase of the said land, he having received the said *Isaac Johnson*'s bond and mortgage for the balance due on the said notes. The plaintiff's counsel objected to the admission of this agreement, but the objection was overruled, and the paper read in evidence.

The defendants then proved, that on the day when the said agreement was executed, *Isaac Johnson* came to \*the intestate, *Phelps*, for the purpose of settling certain notes given by the defendants to *Phelps* for land; and that *Phelps* told *Isaac Johnson* that the notes were not in his possession, but in the hands of some one of his attorneys, for the purpose of writing to the obligors; that the intestate produced a statement of the notes, and of the balance calculated to be due on them, and accepted the bond and mortgage executed by *Isaac Johnson*, for the balance.

On this evidence, a verdict was taken for the plaintiff, subject to the opinion of the court, on a case made, containing the above facts.

*Cady*, for the plaintiff. The argument was no evidence of payment. The acceptance of a bond in satisfaction, cannot be pleaded to an action of debt on another bond; † nor was it admissible, as evidence of accord and satisfaction, under the notice annexed to the plea.

Again, it was not a release. I am aware of the case of *Cuyler v. Cuyler*, † in this court; but that is the first case in which a covenant not to sue has been allowed to be a release, when not made between the very same parties. A covenant to sue is construed a release, merely to prevent a circuity of action; and on the same principle set-offs are allowed; but they must be between the same parties; for if other parties

† *Cro. Car.* 85,  
86. *Bac. Abr.*  
*Release*, A. 2.

‡ *2 Johns. Rep.*  
186.

(a) *Vid. Rowley v. Steddard*, 7 *Johns. R.* 207, note (a).

are introduced, how can it be supposed that it was intended as a release? If the covenant were broken, the defendants could not maintain an action against the plaintiff to recover the sum, which he may recover in this action.

That the intestate and *Isaac Johnson* never considered this as an actual release of the notes, is apparent from the face of the instrument. For if it was really so intended, why not take a release? It is, at best, but an agreement for a release, or a covenant to do an act in future which should amount to a release. A distinction has \*been taken between a covenant for a lease, and a lease.†

Again, the covenants between the intestate and *Isaac Johnson* were mutual and dependent; the intestate was not bound to perform his covenant until *Isaac Johnson* should perform his covenant to procure and give up the contract; and as *Isaac Johnson* did not do this within a reasonable time, the intestate's covenant must be considered as discharged.||

The court will take notice of and protect the rights of assignees.‡ There was notice of the transfer of the notes, or at least sufficient to put the party on the inquiry.¶ Notice is required for the protection of the assignee. There is no pretence that these notes were ever actually paid; and are the rights of the assignee to be sacrificed in order to protect *Isaac Johnson*? If *Isaac Johnson* had been sued on his bond, he might, after paying the notes, have pleaded that the bond was given for the notes, and that the notes had been paid; and a judgment in his suit, against the defendants, will furnish him with a complete defence, in case he should be sued on the bond given to the intestate. *Otis Johnson* has no equity whatever on which to insist on being exonerated from the payment of these notes; and if the defence fails as it respects him, it must fail as to both defendants.

*Sedgwick*, contra. *Otis Johnson* can derive no benefit from the contract for the land; for the deed of the land has been given to *Isaac Johnson*. The plaintiff, as assignee, has really no equity; for he ought to have given immediate notice to the defendants, who are prejudiced by his negligence. Until notice, all acts and payments by the party are good.†† The circumstance of the notes not being in the hands of *Phelps*, was not enough to put the party on inquiry; for the intestate induced *Isaac Johnson* to believe, that though the notes were not in his actual possession, they were within his power and control, as being merely lodged with his attorney. Had the plaintiff given notice to the defendants, they would have been on their guard.

A covenant not to sue is construed to operate as a release, because it is the evident intent of the party, by such a covenant, that his right of action should be released. A covenant to procure and cancel the notes, is a covenant to

NEW-YORK,  
May, 1811.

PHelps  
v.  
Johnson.

† T. Raym.  
Rep. 393.

[ \* 57 ]  
† 5 Johns. Rep.  
74, 77.

|| 1 Saunders,  
320, c. note.  
§ 3 Johns. Rep.  
426.  
¶ 1 Johns. Cas.  
53.

†† 2 Johns. Cas.  
258, 260.

[ \* 58 ]

NEW-YORK,  
May, 1811.

JACKSON  
v.  
WHITE.

12 *Saund.* 48,  
n. 1. See 8  
*Term Rep.* 166.  
13 *East.* 251.

cancel them, which, according to the plain intent and meaning of the parties, is a release.†

In *Drake v. Mitchell*,‡ Lord *Ellenborough* said, that if parties so agreed, one debt or security might be a satisfaction of another.

The covenant with *Isaac Johnson* was for the benefit of both defendants; and the interest of *Otis Johnson* is entitled to the notice and protection of the court, as much as any equitable interest.

*Per Curiam.* The covenant by the intestate with one of the defendants, to procure and cancel the notes given by both the defendants, was a covenant enuring to the benefit of both; and though *Otis Johnson* could not maintain a suit upon it in his own name, seeing it was not a parol promise, but by specialty, yet he had undoubtedly an equitable interest in it, and would be entitled to use the name of *Isaac Johnson*, as a trustee for his interest in the covenant. The validity of such an equitable interest was recognised so long ago as the case of *Offly v. Warde* (1 *Lev.* 235); and since that time, the courts of law have regarded, and will now give effect to the interest of a *cestuy que trust*, in a covenant or other specialty. Taking the bond and mortgage of *Isaac Johnson* was not an extinguishment of the sealed notes (1 *Anst.* 111); but the covenant made with *Isaac Johnson* for the benefit of him and *Otis Johnson*, that the intestate would "procure and cancel the notes," amounted to a release. \*This construction is requisite to avoid circuity of action; for if, instead of cancelling the notes, the intestate or his representatives should put them in suit, and should recover, the defendants would be entitled to recover back, under this covenant, precisely the same damages which they might sustain by reason of the suit. It is, therefore, equally just and reasonable that the covenant should be construed according to its real force and effect. The case in this court of *Cuyler v. Cuyler* (2 *Johns. Rep.* 186), and the general language of the books, establishes the same doctrine.

[ \* 59 ]

The defendants are, therefore, entitled to judgment.

Judgment for the defendants.

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JACKSON, *ex dem.* WHITE and others, *against* WHITE.

A. being seized  
of a house, with  
stables, yards,  
gardens, &c,  
and eighteen  
acres of land

THIS was an action of ejectment, to recover 18 acres of land in the village of *Ballston*. The cause was tried at the *Saratoga* circuit, in *May*, 1810, before Mr. Justice *Van Ness*.

On the 23d *October*, 1808, *Stephen H. White*, being seized of the premises in question, made his last will and testament, by which he bequeathed to his wife *Charlotte*, the defendant, twelve hundred and fifty dollars in cash, his horse and chair, all his household furniture, "and also that large and convenient dwelling-house, together with all the appurtenances and privileges thereunto belonging, situate in the village aforesaid, and the same which is now improved by me as a boarding-house, so long as she shall continue and remain my widow, and also one undivided third of the aforesaid premises for ever."

"Second. I give and bequeath to my brother *James White*, all and every of my clothier's works, including two fulling-mills, situate in said village about 1 1-2 mile north of my clothier's shop, which I do also give to the said *James*, with two sets of tools," &c. "Also I give to the said *James* a legacy of 600 dollars; also the debts due to me from *Daniel Noble* and *Peter Dibble*; the aforesaid legacies to be paid to him on his arriving at 21 years of age; and on condition that he maintain my father, now living in said village, in every thing needful and necessary, for his convenience, during his natural life."

"Third. I give and bequeath unto the said *James*, and my beloved sisters *Rachael* and *Mary*, two thirds of all the aforesaid described premises, bequeathed unto my wife *Charlotte*, to be enjoyed by them in equal parts, in case the said *Charlotte* should intermarry, or in case of her death, to have and to hold the same to them and their heirs for ever." The testator died the 23d *October*, 1808, leaving no issue. *John White*, the father of the testator, and his heir, was one of the lessors.

The testator was a clothier, and purchased the place in question about twelve years ago, and erected a shop and mills, and carried on the business extensively until his death. The business of a clothier in that part of the country, is carried on in the spring and autumn, and does not interfere with the keeping of a boarding-house, at the time visitors usually resort to the springs.

Three or four years after he made the purchase, the testator built additions to the house, and enclosed a convenient yard with a picket fence, and kept a boarding-house for the accommodation of persons visiting the springs; and frequently had sixty or eighty boarders at a time. There is a large court yard in front, extending to the highway. He also built a large stable, repaired the barn for stabling horses, and for a coach-house. There was a gate at the corner of the house, through which was a passage to \*the stables, &c. On the east and west side of the house there were several lots,

NEW-YORK,  
MAY, 1811.

JACKSON  
v.  
WHITE.

adjoining, by his will, devised to his wife as follows: "and also that large and convenient dwelling-house, to

[\* 60] together with all the appurtenances and privileges thereunto belonging, and the same which is now improved by me, as a boarding-house." It was held, that not only the barn, stables, and outhouses, but the land, consisting of orchard, pasture, plough, and wood-land, all of which had been used by the testator, as appurtenant to his boarding-house, and conducive to its support, passed by the will; especially when, from the other parts of the devise, such was the evident intention of the testator. (a)

[\* 61]

NEW-YORK,  
May, 1811.

JACKSON  
v.  
WHITE.

occupied by the testator, in his life-time, as kitchen-gardens, and enclosed with a picket fence. On the east side of the house lot is a way leading from the highway to the premises in question, principally occupied by *E. White*, jun.; the remaining part of the premises consisted of plough land, pasture, orchard, and wood-land.

Some years before his death, the testator enclosed a few acres of the wood and pasture land with a picket fence, and put in two young deer, where, he said, would be a pleasant walk for his boarders. He occasionally used the enclosed land as pasture. On the plough land he raised vegetables for the use of his family and boarders; and the wood-land furnished some fuel, though not enough for his use. All the different lots opened into that part of his premises on which the barn and stables stand. The lot on which the house stands is large, and the house has been long kept as a boarding-house at the springs. It may be used as such, without the premises in question; but with less convenience and advantage. The testator had no other property than what he devised by his will.

*Palmer*, for the plaintiff. The only question is, whether the words of the testator, in the devise to the wife, comprehend the premises in question. The devise ought to be clear

<sup>t</sup> *Bowers v. Blackett, Coup.*  
235.

<sup>t</sup> 2 *Salk.* 935.  
|| *Swainb.* 353.  
354. note.

*Moore*, 7, pl.  
24.

§ *Co. Litt.* 121,  
b. 122, a.  
[\* 62]

and explicit, in order to disinherit the heir at law.<sup>t</sup> If there is any doubt, the rule of law, as to the estate, must take place. The will must be construed by the words of it, not from exterior circumstances; <sup>t</sup> and the heir at law will not be disinherited, unless it results by necessary implication.||

The words of the will may be well satisfied by the dwelling-house and the adjoining lot, without taking the whole 18 acres. The land beyond the house lot and yard, is not appurtenant to the house.§ Appurtenant is confined to the buildings, curtilage, or garden belonging \*to the house. A devise of a messuage, with the appurtenances, does not include lands, though usually occupied with the house.

<sup>t</sup> *Com. Dig.*  
*Grant*, E. 6. E.  
9. *Plowd.* 171.

<sup>††</sup> 1 *Burr.* 283.  
*Gibl. on Dev.*  
16.

<sup>††</sup> 5 *Burr.* 2703.  
|| 2 <sup>2</sup> *Term*  
*Rep.* 498.

*H. Walton* and *Henry*, contra. We contend that the words of the will, if used in a deed, would pass the premises in question.¶ The meaning of the word appurtenances, depends on the subject. The boarding-house was the principal, or subject, and the premises the *accessory* or *incident*. If the words would be sufficient in deeds and surrenders, they must be so in a devise, for courts are much more liberal in the construction of wills to give effect to the intention of the testator. The heir at law takes only what is not devised from him.¶¶ And when the intention is clear, the court will supply omissions, or correct mistakes.¶¶ In *Clements v. Collins*,||| where the testator devised "the house he lived in and garden, to *B.*" the stables, coal-pen, &c. were held to pass, though

used for the purposes of the testator's trade, as well as for the convenience of his house. The court will take the word *appurtenances* in its popular and more extended sense, in order to give effect to the clear intent of the testator.† If out-houses and buildings are included in the word appurtenances, the land on which they stand must also be included.‡

In *Carden v. Tuck*,|| it was held that by the devise of a *messuage*, a garden and the curtilage passed, though the word appurtenances was not used by the testator. In *Smithson v. Cage*,§ a messuage with the appurtenances was surrendered, and it was held that the orchards, yards, curtilage, and garden, passed with the house.

The word *premises* used in the last part of the will includes the house and lands, and shows that the testator, by the word appurtenances, intended to include the land occupied with the house. The testator clearly did not intend to leave any thing to his father; but made ample provision for his support during life. He had no children, \*and the devise shows that his wife was a favorite object in the disposition of his estate. Two-thirds of what was devised to the wife was for her life only, or during her widowhood; in case of her death or second marriage, it went to the testator's two sisters for ever.

*Per Curiam.* Taking the will together, it is apparent that the testator intended that the premises, claimed by the lessors of the plaintiff, should pass to his wife. He devises not only his dwelling-house, "but all the appurtenances and privileges thereunto belonging," and designates the subject devised as "premises," and which he "improved as a boarding-house." It was the *boarding-house establishment* that was intended to be devised, and every *privilege* appertaining to the use of it, and proper to render it convenient and attractive as such an establishment, in such a place as *Ballston Springs*. The outhouses, the garden, the stables, the deer-park, and the pasture, and the plough land, were all used by the testator as privileges appurtenant to his large boarding-house, and conducive to its support and credit. They were all used by him towards that single object; and it is stated that he sometimes entertained from 60 to 80 persons. The case of *Doe v. Collins* (2 Term Rep. 498), shows that stables and a coal-pen will pass, in a devise, by the words *house* and *garden*, they having been used for the convenience of the house. In *Nicholas v. Chamberlain* (Cro. Jac. 121), a conduit and water-pipes in adjoining land, were held to pass by the words *house, with the appurtenances*, because they were necessary and *quasi appendant*. The specific bequest of other parts of the estate of the testator to his brother, and the injunction that he should maintain his father, who now claims the premises, as one of the lessors, and the devise of part of the premises to his two sisters, after the death or re-marriage of

NEW-YORK,  
May 1811.

JACKSON  
v.  
WHITE.

† 1 Bos. and  
Pull. 53. 2 W.  
Blacks. Rep.

727, 728.

‡ 3 Wilson, 141.

Cro. Eliz. 89.

§ Cro. Jac. 529

\* 63 \*

NEW-YORK, his wife, are corroborative of the intent that the premises  
May, 1811. should pass to the wife.

FOOT  
V.  
BROWN.

\*Upon the whole, we think that the general words are sufficient to convey the premises; and judgment ought to be rendered for the defendant.

[ \* 64 ]

Judgment for the defendant.

### FOOT against BROWN.

To say of an attorney or counsellor in a particular suit, "He knows nothing about the suit, he will lead you on until he has undone you," is not actionable, without alleging and proving special damage.

THIS was an action of slander. The declaration stated that the plaintiff was an attorney and counsellor at law, and conducted himself with great fairness, skill, and integrity, &c. and had been employed by *E. Wilson* and another as counsel to manage a suit depending in this court between them and *J. Banyar* and others, lessors in ejectment, &c. That the defendant, in the hearing of *Wilson*, &c. spoke the following false and defamatory words of and concerning the plaintiff, and of and concerning his fairness, skill, and integrity in his professional business, as an attorney and counsellor at law, to wit: "Foot knows nothing about the suit, (meaning, &c.) and he will lead you (meaning, &c.) on until he has undone you."

The jury having found a verdict for the plaintiff, a motion was made in arrest of judgment.

*Mitchell*, for the defendant. The words are not in themselves actionable. The motion in arrest stands precisely on the grounds of a demurrer.<sup>†</sup> The nature and import of the words are not altered or changed by the verdict. The jury have merely found what words were spoken. Their legal nature or import is to be determined by the court. Though words may be spoken *maliciously*, they are not therefore to be taken in a bad sense, or considered as actionable.<sup>‡</sup>

No special damages are laid in the declaration, and \*the injury, if any, must consist in the probable future damage the plaintiff may sustain, from the nature of the words spoken. And this must be a legal and substantial damage, not an imaginary injury; as if a man is charged to be guilty of some particular crime, or as having an infectious disease which may banish him from society. Words, however opprobrious or disgraceful, unless a legal damage or injury is alleged and shown, are not actionable.<sup>||</sup> And the plaintiff must show that the words were spoken of his professional character, and that they have injured or will probably injure him in that character.

Again, all the words must be actionable. If the first are not, the last cannot be actionable; all the words must be such

<sup>†</sup> *Bacon's Abr. Slander. (S.) 4 Rep. 14. Syst. of Plead. c. 31, Demurrer.*

<sup>‡</sup> *3 Bos. and Pull. 372.*  
[ \* 65 ]

<sup>||</sup> *6 Bacon's Abr. (G.) 3 Wils. 186. 2 Term Rep. 475.*

as may produce the consequences supposed.† The words must touch the plaintiff's professional character, and must be calculated to injure or disgrace him in that character. Whenever the words stand together, and are uttered *continua voce*, all the words taken together must be actionable; they cannot be taken and construed in parcels. Then, what is the precise meaning or force of the words charged? They amount to this: "Foot will lead his client to ruin, because he knows nothing about his cause."

NEW-YORK,  
May, 1811.

Foot  
v.  
Brown.

† *Cro. Jac.* 331.  
4 *Co.* 13, 19.  
*Cro. Car.* 328,  
510. *Yelb.* 144,  
154. 1 *Roll.*  
*Abr.* 70, pl. 47,  
and 51, 71, pl.  
55, 56. *Cro.*  
*Eliz.* 541. 2  
*Mod.* 152. *Hob.*  
331.

The question, then, is, whether the imputation of *ignorance* in a particular cause be actionable. It is not an ignorance generally in his profession, but in the particular cause, the facts in which might be intricate and obscure, so as to render it difficult or impossible for the plaintiff to understand them.

Again, the intention of the speaker must be taken from the subject matter, which was the suit. And how are the court to know that it involved any legal question, or that the charge of ignorance in regard to that suit imputed any want of legal knowledge in the plaintiff? But admitting that the words were spoken of his professional character, they do not belong to any class of words \*from which the law implies legal damage. The law does not imply damages, unless they necessarily result from the act complained of, or the nature of the words spoken.† Words to be actionable must be unequivocally so. The old rule that "all words which tend to disparage a man in his trade or profession are actionable," is too vague, and is not correct. According to this, *all comparisons* between professional men would be actionable.

[\* 66]

† 1 *Chitty's Pl.*  
386. *Hetley* 70.

The cases in which it has been held that an action lies for words reflecting disgrace on a man in his trade or profession, may be divided into three classes. 1. Where the words charge the person with a want of fidelity or integrity in his trade or profession generally; as to say of a lawyer, he is a common barrator.|| 2. Where the words charge a person with dishonesty, corruption, or want of integrity, in a particular case.§ 3. Where the words impute ignorance or want of skill in general terms.¶

¶ 4 *Rep.* 16.  
*Hetley*, 167. 1  
*Lev.* 115. *Ld.*  
*Raym.* 147. 1  
*Roll. Abr.* 52.  
53. *Cro. Car.*  
460. *Cro. Eliz.*  
171.

|| 1 *Roll. Abr.*  
57, pl. 37. 2  
*Ven.* 28. *Roll.*  
53, pl. 5. *Roll.*  
60, pl. 10. *Roll.*  
62, pl. 23.  
*Winch.* 41.

|| 1 *Roll. Abr.*  
54, pl. 14. *Cro.*  
*Car.* 332. *Ld.*  
*Raym.* 196. 1  
*Sid.* 327.  
*Winch.* 40. 3  
*Wils.* 59, 186.

11 *Mod.* 221.  
*Cro. Car.* 270.  
*Popham*, 207.  
*Sir.* 1138.  
|| *Cro. Eliz.*  
599.

|| *Cro. Eliz.*  
620.

No fourth class of cases can be found, in which words are held actionable which charge a person with ignorance or want of professional knowledge or skill in a particular case. The case of *Martyn v. Burlingst††* may, at first view, appear to belong to such a class; but if examined, it will be found to be clearly a case of the third class; and all doubt is removed by a subsequent decision of the same court in *Poe v. Mendford*,†† in which it was held not actionable to say of a physician, that he killed his patient with medicine, unless he is also charged with having done it knowingly and wilfully. The same distinction between words spoken of a person generally in his trade or profession, and words charging him with igno-

NEW-YORK,  
May, 1811.

Foot  
v.  
Brown.  
[ \* 67 ]

rance or want of skill in a particular instance, is taken by the chancellor in *Backus v. Richardson* (5 Johns. Rep. 483), and is fully recognised in *Harman v. Delany* (Fitzgib. 121. 2 Str. 398, S. C.), as reported by *Fitzgibbon*, which case is loosely reported by *Strange*; and it reconciles the case of *Redman v. Payne* (1 Mod. 19) with *Lancaster v. French* (2 Mod. 168). The same distinction was also taken by *Atkins*, J. in the case of *Townsend v. Hughes* (2 Str. 794).

The doctrine, as derived from all these cases, is this: Where the words spoken charge a person with want of *fidelity* or *ability*, generally, in his trade or profession, they are actionable; but if they relate merely to a particular case, the charge of want of ability is not actionable. But to charge a man with want of *integrity*, in a particular instance, is actionable. The reason of the distinction is obvious. The charge of dishonesty or want of integrity in any case must be injurious. Dishonesty is a violation of the oath taken by the attorney, as well as a breach of moral duty. But if a man acts honestly, to the best of his knowledge or ability, in the case intrusted to him, the charge of want of skill or ability, in a single instance, is neither disgraceful nor injurious.

*Foot*, contra. On a motion in arrest of judgment, the court cannot look beyond the record. The jury have found the intent and meaning of the words as laid in the declaration. It is unnecessary to go into an examination of the numerous and contradictory decisions on this subject. Any words spoken of a man in his profession which are calculated to destroy the confidence of those who employ him, are actionable, and the law implies damage from the nature and tendency of the words spoken.

[ \* 68 ]

*Henry*, in reply, observed, that where no special damage was alleged, to render words actionable they must be so in themselves, or not susceptible of a harmless sense. This is a principle which runs through all the cases. The charge of ignorance must be general, as to his profession, or they must impeach his integrity. To say of a lawyer, he does not understand his profession, because he cannot levy a *fine*, or of a mathematical instrument maker, that he does not understand his *\*business*, because he cannot construct an *orrry*, is not actionable; though if special damage could be shown, that might furnish ground for a special action.

*Per Curiam*. The words, as laid, only go to charge the plaintiff with ignorance or want of skill in the particular ejectment suit mentioned; and such charge is not actionable, without laying and proving special damages. If a suit would lie for these words, it would lie for saying that a physician did

not understand the nature of the disease of a particular patient. Such a charge does not affect the party generally in his profession, and therefore the law will not give a remedy. In the case of *Poe v. Mendford* (*Cro. Eliz.* 620), the defendant charged the plaintiff with *having killed a patient with physic*, and the court held that the words were not actionable, for the plaintiff might have done it involuntarily, in not knowing the disease; and that a physician might mistake a disease and apply wrong medicines, without discredit. The law only gives an action for words that affect a man's credit in his profession, as charging him with ignorance or want of skill in general, or a want of integrity either in general, or in particular. The cases cited by the defendant's counsel all proceed upon this principle. There is not an instance in the books, which we have met with, of a suit sustained for words charging a professional man with ignorance in a *particular* case. To carry the right of action so far would be unnecessary for the protection of any profession, and would be an unreasonable check upon the freedom of discussion. There is no physician, however eminent, who is not liable to mistake the symptoms of a particular disease; nor any attorney who may not misunderstand the complicated nature and legal consequences of a particular litigation. The additional words added in this case, that "*the plaintiff would lead the party on to ruin*," were a consequence of his ignorance of that particular case, and a deduction \*from that assumed fact. Taken in connection with the preceding words, they were equally inoffensive. There being no special damages averred in this case, the judgment ought to be arrested.

NEW-YORK,  
May, 1811.

Wood  
v.  
PEAKE

[\* 69 ]

Judgment arrested

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### Wood against Peake.

IN error, from the Court of Common Pleas of *Montgomery* county.

*Peake* brought an action of trespass against *Wood*, in the court below, for taking and carrying away, in *January*, 1809, two horses belonging to the plaintiff below. The defendant below gave in evidence an appointment, under the hands and seals of three justices of the peace, of the town of *S.* in the county of *Montgomery*, dated the 27th *December*, 1808, which stated that it appeared to them, that *Jonathan Lawrence*, one of the constables of said county, had for more than 15 days past refused to serve in his office, &c. and rendering his reasons therefor; and that the town not having

In an action of trespass for taking the defendant's goods the defendant justified as a constable, under an appointment of three justices, pursuant to the 6th section of the "act (24th sess. c. 78) relative to the duties and privileges of towns," passed 27th of March.

NEW-YORK,  
MAY, 1811.

Wood  
v.  
Peake.

1801, and that he took the goods as constable, by virtue of an execution issued against the goods of the plaintiff, &c. It was held, that the [ \* 70 ] appointment made by the justices was a judicial act; and being within their jurisdiction, was conclusive and valid, until set aside or quashed on *certiorari*; and could not be questioned in a collateral action. (a)

appointed one in the room or stead of the said *Laurence*, that therefore they appointed *Elisha Wood* a constable, &c. The defendant below also produced an execution issued by a justice of the peace against the goods, &c. of *Peake*, dated the 7th *January*, 1809, which was delivered by the justice to *Wood*, as one of the constables of the town, to be executed, who, by virtue of the execution, took the horses of *Peake*, and sold them, &c.

The plaintiff proved that two constables, *Laurence* and another, were chosen by the inhabitants of *Salisbury*; and he offered a witness to prove that *Laurence* never did refuse to serve as a constable, nor was he unable to do so, but actually did serve as a constable the 30th *December*, \*1808, and in *March* following. This evidence was objected to by the defendant's counsel, but admitted by the court below, on which a bill of exceptions was tendered and signed.

*Cady*, for the plaintiff in error. The appointment by three justices was a judicial act; and being in a case in which they had jurisdiction, it must be conclusive (3 *Term Rep.* 38. 2 *East*, 246. 1 *Burr.* 245. 2 *Str.* 1149, 1213). If the plaintiff below wished to have the proceedings of the justices corrected, he should have removed them, by *certiorari*, to this court. But the court of common pleas had no right to decide on the validity of that appointment. The constable acting under the authority of the magistrate will be protected (2 *Caines*, 108), though there should be some irregularity on the face of the process (*Crump v. Halford*, 4 *Mod.* 347).

*Van Vechten*, contra. The authority given to the justices, by the act (24 sess. c. 78, s. 6. [1 R. S. 348, s. 36. *Id.* 347, s. 31]) is special, and must be strictly pursued. The act declares, that if any of the officers chosen should refuse to serve, or should die, or remove, or become incapable of serving, and the town should not in 15 days after such refusal, death, removal, or incapacity, choose another, then three justices may, by warrant, appoint. In the present case, *Laurence* did not refuse, and, in fact, acted as constable in *December*; the justices, therefore, had no authority or jurisdiction, except in the cases designated; and this not being one of them, the appointment was void, and the person acting under it a trespasser. The appointment may be a judicial act, yet it will avail nothing, unless it appears also that the justices acted within their jurisdiction.

*Per Curiam*. The act (*Laws*, vol. 1, 326, 327, 329. [1 R. S. ut. sup.]) declares, that "if any constable, chosen, &c. shall refuse to serve, it shall be lawful for the inhabitants of the

(a) *Mather v. Hood*, *supra*. 44.

town to supply such vacancy at a special town-meeting, to be notified and held, &c. ; and that if the town shall not, within 15 days next after such refusal, &c. choose another, it shall be lawful for any three justices of the peace residing in or near such town, and they are required by warrant under their hands and seals, to appoint every such officer which the town ought to have chosen ; and every officer so appointed, shall hold his office for so long time, and have the same powers, and be liable to the same penalties, as if elected. And that if any person so appointed a constable, &c. shall refuse to serve, he shall forfeit a penalty of 62 dollars and 50 cents."

NEW-YORK,  
May, 1811.

Wood  
v.  
PEAKE.

[ \* 71 ]

These are the statute provisions relative to the subject, and the record states that the defendant below was appointed constable by three justices, in the form prescribed by the act ; and the warrant recited that *Laurence*, one of the constables of the town, had for more than 15 days. refused to serve, and that the town had not appointed another in his stead, and that therefore they appointed the defendant.

To an action of trespass for serving an execution, the defendant below, as constable, justified under this appointment ; and the court below then admitted testimony to prove that *Laurence* had not refused to serve, and the question brought up is on the competency of this proof.

This appointment is a judicial act, for the justices must first determine and adjudge that there is a vacancy in the office, and that the town neglected to fill it up. It is not traversable in such a collateral action. The appointment remains valid until it be set aside or quashed in the regular course, upon *certiorari*. It is certainly sufficient to justify the constable. He comes to the office by an appointment, regular according to the forms of law, and made by a tribunal having jurisdiction in the case ; and he is bound to accept, under a penalty. He is not to inquire, at his peril, into the validity of the act. It is sufficient that three justices have authority to make such an appointment in the given case. It would be intolerably oppressive to place the constable in the dilemma of subjecting himself to a grievous penalty if he \*refuses, or of being prosecuted for trespass if he accepts. If two justices only should appoint him, it would then be a case in which no jurisdiction existed, and the appointment would be null and void. The distinction in the books is between cases where the authority proceeds from a source possessing jurisdiction over the subject matter, and from one that does not. The ministerial officer can justify in the one case, and not in the other. (a) (*Brown v. Compton*, 8 *Term Rep*

[ \* 72 ]

(a) *Vid. Warner v. Shed*, 10 Johns. R. 138. *Suydam v. Keys*, 13 id. 444. *Beach v. Furman*, 9 Johns. R. 229. *Smith v. Shaw*, 12 Johns. R. 257. *Cable v. Cooper*, 15 Johns. R. 152. See also an analysis of the above cases, and others of analogous import both in England and the United States, in *Savacorl v. Boughton*, 5 *Wendell*, 170. *Lewis v. Palmer*, 6 *Wendell*, 307.

NEW-YORK, 424.) The testimony offered to impeach the appointment  
May, 1811. was inadmissible, and the judgment must be reversed.

BAKER  
v.  
BARNEY.

Judgment reversed

BAKER against BARNEY.

If a husband and wife part by consent, and the husband secures to her a separate maintenance, suitable to his condition in life, and pays it according to agreement, he is not liable for articles furnished to his wife; not even for necessaries. And the general reputation of the separation will [\* 73] be sufficient. But where the agreement on the part of the husband to pay a certain sum to his wife, or a separate maintenance, was not reduced to writing, and no evidence of any payment having been made by him to her, he was held liable for goods furnished to his wife during the separation. (a)

IN error, on *certiorari*, from a justice's court. The return stated, that *Barney* sued *Blake* before the justice, and declared for goods sold to \$11 97. The defendant plead *non assumpsit*; and there was a trial by jury. The plaintiff proved the sale and delivery of the goods to the *wife* of *Baker*, on the 7th *January*, 1809, and his clerk proved that the common report, at that time, was, that *Baker* did not live with his wife. *Barney* proved that he and his wife, in *December*, 1808, *parted by consent*, about seven weeks *before* the goods were delivered to her; and that he was to give her \$1,000; and that she resided at a different place. It did not appear that when *Baker* and his wife parted, and he agreed to give her \$1,000, that any writings passed; but in the spring of 1809, it was understood that the writings between the husband and wife were executed. No evidence was given of any payment by *Baker* to his wife.

*Skinner*, for the plaintiff in error.

*Foot*, contra.

*Per Curiam*. If the husband and wife part by consent, and he secures to her a separate maintenance suitable to his condition and circumstances in life, and pays it according to agreement, he is not answerable even for necessities; and the general reputation of the separation will, in that case, be sufficient. It was so ruled by *Holt*, Ch. J., in *Todd v. Stokes* (1 *Salk.* 116); and this general doctrine seems to have been conceded in *Nurse v. Craig* (5 *Bos.* and *Pull.* 148), in which case all the authorities are carefully reviewed, and the extent of the husband's responsibility, when he and his wife part by consent, fully and ably discussed. The court in that case laid great stress upon the circumstance of the due security and punctual payment of the pecuniary maintenance allowed to the wife. In the present case, the husband and wife parted by consent, a few weeks prior to the sale of the goods, but the contract was not reduced to writing until the spring fol-

(a) *Vid. Fenner v. Lewis*, 10 Johns. R. 38. *M'Cutchin v. M'Gahay*, 11 Johns. Rep. 281. *Lockwood v. Thomas*, 12 Johns. R. 248. *Sheilthar v. Gregory*, 2 *Wendell*, 422.

owing; and there was no evidence of payment of any part of the sum agreed to be given to the wife. The whole rested in a naked promise, without validity; and if the husband was from that time to be discharged from responsibility for necessaries, the wife might have been left to subsist on charity. The goods taken up in this case, cannot be considered as unreasonable or improper; and the defence below failed from the want of showing, that at the time of the sale of the goods the allowance was punctually paid or secured according to the agreement. The judgment must therefore be affirmed.

NEW-YORK,  
May, 1811.

MILLER  
v.  
MILLER.

\*MILLER against M. MILLER.

[ \* 74 ]

IN error, from the Court of Common Pleas of *Rensselaer* county. The defendant in error brought an action of slander against the plaintiff in error, in the court below, for speaking the following words: " *Tina Miller* has stolen my watch, and *Polly Miller* (meaning the plaintiff below) has concealed it for her." In the second count, the words charged were, "my watch was stolen out of the widow *Miller's* (plaintiff's) bar, and *Tina Miller* took it, and her mother (plaintiff) concealed it." From the record it appeared, that there was a trial by jury, who found a verdict for the plaintiff for 35 dollars damages and six cents costs, on which the court gave judgment. In the assignment of errors, it was stated that there had been a demurrer to the evidence, but it did not appear that the plaintiff joined in it, or that it was allowed. There was a variance of six cents between the judgment of the court, and the calculation of the whole amount of damages; the judgment being for the damages assessed by the jury, and 50 dollars costs of increase, amounting in the whole to 85 dollars, omitting the six cents.

The proof at the trial was, that the defendant below said that his watch had been stolen from him in the plaintiff's bar-room, and that he had reason to believe that *Tina Miller* took it, and that her mother (the plaintiff) concealed it.

The counsel agreed that the court might consider, whether the evidence contained in the demurrer was sufficient to warrant the finding of the jury, unembarrassed by any objection as to the form in which it came before the court.

*Russell*, for the plaintiff in error.

\*Foot, contra.

[ \* 75 ]

(a) The words must be proved substantially as laid. It is not sufficient to prove equivalent expressions. *Fox v. Vanderbeck*, 5 Cowen, 513. *Olmstead v. Miller*, 1 *Wendell*, 506. But all the words laid need not be proved. *Fox v. Vanderbeck* *ut supra*. *Loomis v. Swick*, 3 *Wendell*, 205.

NEW-YORK,  
May, 1811.  
MILLER  
v.  
MILLER.

*Per Curiam.* Two questions arise in this cause.

1. Do the words, as proved, support the charge in the declaration, and are they actionable?

2. What is the effect of the miscalculation in the total amount of damages.

It is now sufficient to prove the substance of the words, and the sense, as well as manner of speaking them, must be the same. (*Bull. N. P. 5. Esp. Dig. 521.*)

If words are charged to be spoken in the third person, as he, &c. and the proof be of words in the second person, as you, &c. the proof will not support the declaration, there being a difference between words spoken in a passion, to a man's face, and deliberately behind his back.

The defendant below made a positive charge that his watch had been stolen in the bar of the plaintiff below, and he added that he had reason to believe that *T. Miller* had taken it, and that her mother (the plaintiff below) had concealed it. The assertion that he had reason to believe that the one took, and the other concealed it, is equivalent to the charge that the one stole or took it, and the other concealed it. In the case of *Oldham v. Peake* (2 Bl. Rep. 961), the words were, "I am thoroughly convinced that you are guilty," &c. and it was held by *Gould* and *Blackstone*, Justices, that they were equal to a positive averment, for that a man only avers a thing, because he is convinced of the truth of it. So, in this case, the allegation that his watch had been stolen, and he had reason to believe, &c. amounts to a positive averment; for a man only alleges a thing to be so, because he has reasons for believing it so. In *Stick v. Wisedome* (Cro. Eliz. 348), the words were "many an honest man has been hanged and a robbery hath been committed, and I think he was at it, and I think he is a horse-stealer." \*It was moved in arrest of judgment, that the words were not an express averment; but the court held the contrary, and gave judgment for the plaintiff. There are many other cases to the same effect.

It is not necessary in order to render words actionable, that there should be the same certainty in stating the crime imputed, as in an indictment for the crime. It was not, therefore, requisite in this case to allege or prove that the plaintiff in error, when she concealed the watch, knew it to be stolen. The slanderous words import a criminal concealment of the watch by the defendant in error. The case of *Fiese v. Linder* (3 Bos. & Pull. 372), differs greatly from this case. There the charge was, that the plaintiff "had brought a false bill of lading for half the cargo already." The court held that to bring a forged bill of lading might or might not be an innocent thing, and that the declaration contained no sufficient charge, showing that the words were used in a bad sense; but in the present case, we must construe the charge of concealing the watch with the precedent words, which averred that

it had been stolen out of the bar of the plaintiff below by her daughter, and so construing the words, they do impute criminality.

The variance of six cents in the *toto attingens*, is in favor of the plaintiff in error. He is not, therefore, grieved by the mistake; and it would be unjust to reverse a judgment for a fault in favor of the party bringing the writ of error.

NEW-YORK,  
May, 1811.

M'FARLAND  
v.  
IRWIN

Judgment affirmed.

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\*MILLER *against* T. MILLER.

[ \*77 ]

THE facts of this case were the same as in the preceding cause. The proof was, that the defendant had said, "that his watch had been stolen at the widow *Miller's*, and that he had reason to believe that *Tina Miller* had taken it."

Russell, for the plaintiff in error.

Foot, contra.

*Per Curiam.* This case brings up only one of the points decided in the last case, which is, whether after the charge of the plaintiff in error that his watch had been stolen, the addition of the words, "and he had reason to believe that the defendant in error took it," is not a positive averment of the fact. The principle already laid down in the preceding case, is decisive in the present; and the judgment must be affirmed.

Judgment affirmed.

---

M'FARLAND *against* IRWIN.

THIS was an action of *scire facias* to revive a judgment in debt for 500 dollars, and 14 dollars and 43 cents, costs. To the declaration on the *scire facias*, the defendant pleaded, that the plaintiff ought to have execution for 50 dollars, part of the said debt, with the interest on the said sum of 50 dollars from the 21st of November, 1807, being the date of the bond and warrant of attorney; but that for the residue of the said debt, the plaintiff ought not to have his execution against the defendant, because the judgment was given by virtue of a certain bond, conditioned for the payment of 250 dollars, and a warrant of attorney accompanying the same; and that the said bond and warrant of attorney were executed by the

To a *scire facias*, on a judgment, the defendant cannot plead any matter which he might have pleaded to the original action, or which existed prior to the judgment; and it makes no difference whether the judgment was enter

NEW-YORK,  
May, 1811.

M'FARLAND  
v.  
IRWIN.

ed up by confession on a warrant of attorney, or by default, or on plea; but where the judgment is by confession, the proper remedy is by an application to the court for relief on motion. (a)

defendant, pursuant to an agreement made between the plaintiff and defendant the 27th of November, 1807, by which the plaintiff agreed to give to one *A. E.* a power to dispose of a certain piece of land in *Ireland*, and to advance 50 dollars towards his expenses to *Ireland*; and if the said *A. E.* should sell the land, the bond and warrant of attorney were to be security for the re-payment of the 50 dollars advanced, and 200 dollars for the land on the return of *A. E.*; but if the land was not sold, the plaintiff was not to exact payment of the bond; that the plaintiff executed the power, and advanced the 50 dollars to *A. E.* pursuant to the agreement, but that *A. E.* was not able to sell and dispose of the land, &c.; and this he was ready to verify, &c. wherefore, &c.

To this plea there was a demurrer and joinder in demurrer.

*Foot*, in support of the demurrer, contended, that the plea was inadmissible and bad, as nothing could be pleading to a declaration on *scire facias*, which goes to defeat the original judgment, and which might have been pleaded to the original action. (2 *Saund.* 72, note. *Cro. Eliz.* 283. *Coup.* 727.)

[\*79]

*Wendell*, contra, insisted, that the defendant could plead any defence which he could have done in the original \*action. (10 *Mod.* 112.) But here, this being a judgment by confession, on a warrant of attorney, there was no original action, nor any opportunity for the defendant to plead the matter which he has now pleaded. The demurrer admits the fact, that the bond and warrant of attorney were given for certain purposes, which have wholly failed.

*Per Curiam.* The plea is inadmissible and bad. It is a settled rule, that the defendant cannot plead any matter to a *sci. fa.* on a judgment which he might have pleaded to the original action, or which existed prior to the judgment. A judgment entered upon a warrant of attorney is a judgment by confession, and the cases of *Bush, assignee of Jones*, v. *Gower* (*Cases temp. Hardwicke*, 220), and of *Cooke v. Jones* (*Coup.* 727), were cases of a *sci. fa.* upon a judgment entered by confession on a warrant of attorney. The rule is the same whether the judgment was obtained by confession, or default, or upon plea. The remedy in these cases of judgment by confession is by application to the court upon motion, as was done in the case of *Jackson v. Mosely*, cited by Lord *Hardwicke*, and in the case from *Couper*.

#### Judgment for the plaintiff.

(a) *Vid. Green v. Ovington*, 16 *Johns. Rep.* 55. The rule that no matter can be pleaded to a *scire facias* which might have been pleaded to the original action, is always limited to parties and privies. *Griswold v. Stewart*, 4 *Couwen*, 457.

NEW-YORK,  
May, 1811.ARNOLD  
v.  
CRANE.

## ARNOLD against CRANE.

IN error, from the court of common pleas of *Ontario* county. *Arnold* sued *Crane* in the court below, in an action of *assumpsit*. The declaration contained the usual counts for money lent, money paid, &c. and money had and received, &c. and an *instimul computassent*. Plea, *non assumpsit*, with notice.

At the trial of the cause, the plaintiff produced the depositions of *Perry Brainerd* and *Jacob Brainerd*, taken in the state of *Connecticut*, who testified that the plaintiff lent to the defendant, at three several times, the sum of one hundred dollars, for which he took his three several promissory notes. *Daniel Brainerd*, another witness, deposed, that in *March* or *April*, 1806, the plaintiff and defendant came to his house, and the defendant requested him to draw a deed of a lot of land in *Wallingford*, from the defendant to the plaintiff, to secure him for the money owing from the defendant. The witness accordingly drew a warranty deed, which was executed by *Crane*, and duly acknowledged and delivered to the plaintiff. The defendant then offered to get the deed recorded for the plaintiff; and the plaintiff delivered the defendant the deed for that purpose, and paid him the cost of having it recorded; and the defendant promised to get it recorded and return it. The consideration expressed in the deed was 300 dollars. The defendant afterwards said to the plaintiff, "as I have given you a deed, you ought to give up the notes," but the witness did not recollect whether the plaintiff gave the notes to the defendant or not. The plaintiff was about 70 years old, without children, and the defendant was brought up in his family until he was of age, and was afterwards assisted by the plaintiff.

*Caleb Brainerd* also deposod, that by the request of the plaintiff he applied to the defendant to pay the money due to the plaintiff, or to send him the deed, and that the defendant said he had sold his place, and promised to bring the money to the plaintiff the next week. A similar promise was made by the defendant on a second application, in behalf of the plaintiff; but the defendant removed \*into this state, without seeing the plaintiff, or paying him any money.

*Hunn Munson*, clerk of *Wallingford*, testified, that the defendant never left with him the deed to the plaintiff, to be

(a) *Saxton v. Johnson*, 10 Johns. R. 418. *Pierce v. Crafts*, 12 Johns. R. 90. *Hughes v. Wheeler*, 8 Cowen, 77. *Williams v. Allen*, 7 Cowen, 316. *Walrad v. Petrie*, 4 Wendell, 375. *Olcott v. Rathbone*, 5 Wendell, 490. *Utica Ins. Co. v. Bloodgood*, 4 Wendell, 692.

(b) Where a usurious note was given for a valid note which was destroyed by the parties, an action was sustained upon the original contract. *Hughes v. Wheeler*, 8 Cowen, 77. *Vid. Pierce v. Drake*, 15 Johns. R. 475.

A promissory note may be given in evidence under the money counts. (a) *A*. gave his notes to *B*. for money lent to him by *B*. and afterwards executed a deed for the amount of the debt to *B*. who gave the deed to *A* to get it recorded, on *A*.s promise to have it duly recorded; and also gave up the notes to *A*. and *A* kept the deed with out having it recorded, and sold the land to another person whose deed was recorded; and *A*. refused to pay the money to *B*. or return the deed or notes; it was held, that *A*. having got possession of the notes by fraud, there was no payment or extinguishment of the original debt; and *B*. might recover the money lent to *A*. on the usual money counts. (b)

[\*81]

NEW-YORK,  
May, 1811.

ARNOLD  
v.  
CRANE.

recorded, nor was any such deed recorded in his office ; but that a deed from the defendant to *Joshua Austin* had been recorded, which, it appeared, was for the same land mentioned in the deed to the plaintiff. The plaintiff proved the due service of a notice on the defendant to produce the notes and deed to the plaintiff at the trial ; but neither of them were produced. The plaintiff also read in evidence a letter from the defendant to *Hunn Munson*, dated *June 7, 1809*, which admitted the fact that the deed and notes were in possession of the defendant.

On this evidence a motion of nonsuit was made by the defendant's counsel, and the court below decided that the evidence was insufficient to support the plaintiff's declaration, and gave judgment of nonsuit. A bill of exceptions was tendered by the plaintiff's counsel, on which the writ of error was brought.

*H. Bleecker*, for the plaintiff in error.

*Van Vechten*, contra.

*Per Curiam.* The testimony offered in the court below was competent to sustain the action, and ought to have gone to the jury under that direction. The plaintiff may give a note in evidence under the money counts. The original loan of 300 dollars was amply proved ; and the defendant got possession of the notes given for the 300 dollars, by means of a base fraud, and there was no payment or extinguishment of the original debt. The testimony of *Daniel* and *Caleb Brainerd*, and of *Hunn Munson*, and the letter of the defendant, were conclusive \*proof, standing uncontradicted, that the notes were never paid, and that the deed to the plaintiff was a mere fraudulent pretence, and one that was not even carried into effect. The deed was not recorded according to the original agreement, for that would have exposed the fraud at the time. This is not an action for a fraud. The suit is for the original debt, and the only question is, whether the debt is to be considered as paid or extinguished by the transaction relative to the deed. It would be an affront to common sense and to justice, to allow any weight or effect to such a fraud. The case of *Wilson v. Force* (6 *Johns. Rep.* 110) is very much in point. The plaintiff brought an action of *assumpsit* for goods sold. The defendant set up payment, and the plaintiff offered to prove fraud in the defendant in the special contract which the defendant set up as payment, and the court of common pleas in *Dutchess* rejected the proof offered on the part of the plaintiff, and nonsuited him ; and this court, on error, reversed the judgment, and held that the evidence ought to have been received ; for the fraud rendered the special contract set up in discharge of the debt, null and void

The judgment below must be reversed; and the plaintiff is at liberty to sue out a *venire* from this court, returnable at the *Ontario* circuit.

NEW-YORK,  
May, 1811.

BULLIS  
v.  
GIDDENS.

Judgment reversed.

BULLIS, Administrator of SALISBURY, against GIDDENS  
and BROWN.

THIS was an action of *debt* on a *recognisance* of bail. The defendant pleaded *nil debet*, with notice that he \*should give in evidence at the trial, that the defendants in the original action had fully paid and satisfied to the plaintiff the amount of the judgment, &c.

To this plea there was a demurrer and joinder in demurrer.

*Foot*, in support of the demurrer.

*Adams*, contra.

*Per Curiam.* This case comes before the court on a demurrer to the plea of *nil debet* to an action of debt on *recognisance* of bail, and the only question is, whether such a plea is good.

When the specialty of record is but inducement to the action, and matter of fact is the foundation of it, *nil debet* is a good plea; as in debt for rent by indenture, or for an escape, or on a *devastavit*. In these cases the indenture or judgment is but inducement; and the arrears of rent, the escape and *devastavit*, are the foundations of the action. But when the action is grounded on a record or specialty, *nil debet* is no plea. This rule will be found to be fully supported by numerous authorities, (1 *Saund.* 39, n. 3. 2 *Ld. Raym.* 15. 2 *Stra.* 778. 8 *Mod.* 107, note), and according to which the plea in this case is bad. Whenever the validity of the plea of *nil debet* has been called in question in this court, it has been after trial, where the plaintiff had treated the plea as good, and therefore came too late to question it. (1 *Johns. Rep.* 510. 2 *Johns. Rep.* 183. 2 *Johns. Cas.* 257.) Although this rule may deprive the defendants, in such cases, of pleading the general issue, with notice of special matter under the statute; yet it does not preclude them from pleading specially, any matter which they may have to set up in

*Nil debet* is not a good plea to an action of debt on *recognisance*, nor any action founded on a record or specialty. But where the record or specialty is merely inducement to the action, which is grounded on matter of fact, as in debt for rent, or an escape, or on a *devastavit*, there *nil debet* may be pleaded (a)

(a) *Acc. Minton v. Woodworth*, 11 *Johns. R.* 474. *Jansen v. Ostrander*, 1 *Cowen*, 671. *Niblo v. Clark*, 3 *Wendell* 24. *S. C.* in error, 6 *Wendell*, 236. *Childress v. Emory*, 2 *Wheat.* 642. *Sneed v. Wistar*, *id.* 690. This plea is now authorized by the legislature in an action of debt or judgment, to be accompanied by a notice of special matter, or for the purpose of admitting a set off. 2 *R. S.* 352, s. 10. *Id.* 355, s. 20.

NEW-YORK, their defence ; and this inconvenience had better be submitted to, than to innovate upon the settled and established rules of pleading.

SMITH  
v.  
BRUSH

The plaintiff must, accordingly, have judgment.

[\* 84]

\*SMITH *against* I. BRUSH and others.

In an action of debt on a bond, where the defendant pleaded *usury*, which was alleged to consist in including in the bond 183 dollars 72 cents, for forbearance of payment ; and it appeared that the plaintiff was to deliver to the defendant a horse, of the value of 100 dollars, and which made part of the sum of 183 dollars and 72 cents. It was held, that the evidence of the usury, given at the trial, varied from what was alleged in the pleadings, and that any variance in the sum alleged to be usurious, or in the consideration stated to be given for the forbearance, was fatal

[\* 85]

to the plea, and that such evidence ought to be rejected. (a) Whether usury or not, is a question of fact for the jury to decide. (b)

A new trial will not be granted on the ground of newly discovered evidence, which does not relate to new facts, but goes only to corroborate

THIS was an action of debt, on a bond for the penal sum of 4,000 dollars, dated *January* 1st, 1808.

The defendants pleaded the general issue and usury, with notice.

The cause was tried at the *Dutchess* circuit in *September*, 1810, before the *Chief Justice*.

To prove the usury, *E. Brush* testified, that he was in the office of the defendant, *I. Brush*, about 9 o'clock in the evening of the 31st *January*, 1810, in bed, when the plaintiff and *I. Brush* came in and conversed together about the bond, which the witness understood to be the bond in question ; and the defendant, *I. Brush*, said to the plaintiff, he need not be in a hurry for payment, as he was well paid for waiting, and produced a statement, in writing, of the different sums that composed the consideration of the bond, among which was the sum of 183 dollars and 72 cents, charged as a *premium*. It appeared, also, from the testimony, that the plaintiff was to deliver to the defendant a horse, called the buck horse, valued at 100 dollars, and which made part of the said sum, or premium. There was various other evidence, as to the fact of usury, which it is unnecessary to detail ; the objections to which, and a motion for nonsuit, were overruled by the judge, who observed to the jury, that it was a matter of fact for them to decide, whether any part of the consideration of the bond was usurious ; that the term *premium* was well understood, &c.

The jury found a verdict for the plaintiff. A motion was made to set aside the verdict, and for a new trial ; 1. Because the verdict was against evidence ; 2. For the misdirection of the judge ; 3. On affidavits of newly discovered evidence.

*Ruggles*, for the defendants.

*Tallmadge* and *E. Williams*, contra. They cited *Cowp.*

(a) And a variance is equally fatal where usury is pleaded in an answer in chancery. *Beach v. Fulton Bank*, 3 Wendell, 573. So where the usurious contract is set forth in a notice with the plea of *non est factum* to an action of debt, it must be proved as laid. *Lawrence v. Knies*, 10 Johns. Rep. 140. *Alier in assumpsit*, under *non assumpsit* with notice of special matter. *Fulton Bank v. Stafford*, 2 Wendell, 483. Even where the usury is specially pleaded, if the evidence is inapplicable to the facts set forth in the special plea, it may be admitted under *non assumpsit*. *Levys v. Gadsby*, 3 Cranch, 180.

(b) *Vid. Law v. Merills*, 6 Wendell, 268.

671. 3 *Mod.* 35. 3 *Term Rep.* 351. 1 *Burrow*, 54. 10 *NEW-YORK*,  
*May. 1811.*  
*East*, 268.

SMITH  
 v.  
 BRUSH.

*Per Curiam.* This is a hard defence. The defendants attempt to defeat the plaintiff, in recovering 1,816 dollars and 28 cents, confessedly due him. They have had a chance to do so. The jury have disbelieved the testimony of the witness, by whom the usury was to be proved, and it cannot be said, that there were not suspicious circumstances ; the time, the place, and the nearness of the defendant's connection with the witness, were all proper subjects of consideration by the jury.

It appears that the evidence of the usury varied substantially from the usury pleaded, or given notice of. Neither the plea nor notice mentions that the *buck horse* formed any part of the consideration of the bond ; but the usury is alleged to consist in including in the new bond, 183 dollars and 72 cents, as the consideration of giving the day of payment. Now, it appears, by all the evidence, that the *horse*, which was worth about 100 dollars, formed part of that item. It is well settled, that a variance in the sum is fatal ; if so, it is equally fatal to vary in the consideration. Instead of usury to the amount stated in the plea and motion, there was usury only to the extent of a part of it, about 83 dollars and 72 cents. The court ought to have rejected the evidence on this principle ; and as it was improperly given, it goes for nothing.

The new testimony alleged to be discovered, does not relate to any new fact, but goes merely to corroborate \*the credit of *Brush's* testimony, by proving that the parties met in the room, where he lay in bed, by accident, and not by any pre-concerted arrangement with the defendant ; but it is against the general rule to grant a new trial, merely for the discovery of cumulative facts and circumstances relating to the same matter, which was principally controverted upon the former trial. It is the duty of the parties to come prepared upon the principal point ; and new trials would be endless, if every additional circumstance, bearing on the fact in litigation, was a cause for a new trial. The rule against a new trial for this cause, was stated by the court in *Steinbach v. Columbian Insurance Company* (2 *Caines*, 129). The motion ought, therefore, to be denied.

[ \* 86 ]

Motion denied.

(c) *Acc. Jackson v. Crosby*, 12 *Johns. Rep.* 354. *Pikè v. Evans*, 15 *Johns. Rep.* 210. *Whitbeck v. Whitbeck*, 9 *Cowen*, 266. *Gygot v. Butts*, 4 *Wendell*, 579.

NEW-YORK,  
May, 1811.

ROBINSON

v.

Executors of  
WARD.

An action cannot be maintained in this state on a judgment recovered in another state, against *bail*, where the proceeding was by attachment of goods, without any personal summons or actual notice to the bail, who, at the time, had removed into, and become an

[\* 87] inhabitant of his state. There is no difference, in this respect, between a suit against *bail*, or a suit against the principal.

ROBINSON *against* The Executors of WARD.

THIS was an action of debt, on a judgment obtained in the court of common pleas of *Addison* county, in the state of *Vermont*. The declaration alleged that the plaintiff recovered judgment, in *March*, 1804, for 83 dollars and 47 cents, against one *Miller*, in a suit in which *Ward* was the bail of *Miller*; and that afterwards such proceedings were thereupon had, that in *February* term, 1808, in the same court, it was adjudged that the plaintiff should have execution against *Ward*, as bail of *Miller*, for the amount of the judgment, with costs, &c.; and that the same remains unpaid, &c.

The defendant pleaded *non detinet*. The cause was tried at the *Albany* circuit, before the *Chief Justice*, in *October*, 1810.

\*At the trial, the plaintiff produced a copy of the record, by which it appeared that the judgment was obtained against *Miller*, after a personal service of process; and that an execution was issued against him and his property, which was returned *non est*; and that on the application of the plaintiff an attachment was issued to the sheriff, commanding him to attach the property of *Ward* to the amount of 130 dollars, to notify him of the same, and if no property could be found, to take the body of *Ward*, and have him before the same court in *September*, 1804, to *show cause* why the plaintiff should not have execution against him, &c. The return of the sheriff on the attachment was as follows: "September 12, 1804. I then served this writ, by attaching one good hay-knife, and one old iron hoe-handle, found at the house of *Lemuel Burrows*, in *Bridport*, in said county, which property was certified to me to belong to the within-named *John Ward*, late of said *Bridport*; and at the same time left a true

(a) A judgment rendered by a court of general jurisdiction, in a neighboring state is full and conclusive evidence of the matter adjudicated therein, liable only to be impeached on the ground of want of jurisdiction over the person of the defendant or the subject matter of the suit. Previous to the publication of the decision in *Mills v. Duryee*, 7 *Cranch*, 481, such judgments were held only *prima facie* evidence, as in *Taylor v. Bryden*, *infra* 173, and *Pawlings v. Bird's Executors*, 13 *Johns. Rep.* 192. Under the later decisions, the jurisdiction may be put in issue by plea, but not the merits of the judgments. *Borden v. Fitch*, 15 *Johns. Rep.* 121. *Shumway v. Stillman*, 4 *Cowen*, 292. S. C. 6 *Wendell*, 447. *Starbuck v. Murray*, 5 *Wendell*, 148. *Hollbrook v. Murray*, *id.* 161. *Andrews v. Montgomery*, 19 *Johns. Rep.* 162. *Hampton v. Mc Connell*, 3 *Wheat.* 234. *Mayhew v. Thatcher*, 6 *Wheat.* 129. The following is the language of the court in the latest reported case on this subject in the state of New-York. "The judgment of a court of general jurisdiction, in any state of the union, is equally conclusive upon the parties in all the other states, as in the state in which it was rendered. This however is subject to two qualifications. 1. If it appear by the record that the defendant was not served with process, and did not appear in person or by attorney, such judgment is void; and 2. If it appear by the record that the defendant appeared by attorney, the defendant may disprove the authority of such attorney to appear for him." *Shumway v. Stillman*, 6 *Wendell*, 453. In an action on the judgment of a court of limited jurisdiction, the plaintiff must show affirmatively that the court had jurisdiction, in the first instance. *Thomas v. Robinson*, 3 *Wendell*, 267.

and attested copy of this writ, and an account of the articles attached theron, together with this my return endorsed, at the last usual place of abode of the within-named *John Ward*, in said *Bridport*."

NEW-YORK,  
May, 1811.  
ROBINSON  
v.  
Executors of  
WARD

The plaintiff appeared at the court, and the cause was continued until *August* term, 1807; when the plaintiff again appeared, and *Ward* did not appear; but it was shown to the court, that he had removed out of the state. The court ordered further notice to be given to *Ward*, by a publication of the substance of the declaration, and order of the court, for three weeks, in the gazette called the "*Middlebury Mercury*." The cause was then continued until *February* term, 1808, when the plaintiff appeared, and proved the publication of the notice to *Ward*, pursuant to the order of the court; on which *Ward* was called, but made default; and a judgment was entered against him for 114 dollars and 8 cents.

\*After reading the copy of the proceedings in *Vermont*, the jury found a verdict for the plaintiff, subject to the opinion of the court on a case containing the above facts.

[\*88]

A motion was made to set aside the verdict and for a new trial.

*Sill*, for the plaintiff. We contend that the judgment in *Vermont* against *Ward* was valid, and sufficient to support the action in this court against his representatives. It cannot be pretended, that to render a judgment in another state valid, it is necessary that it should be founded on the same course of proceedings as is required by the laws of this state. Nothing more can be requisite, than that it should appear that such proceedings were had in the foreign state, as would give the defendant such notice, as is equivalent to what is required by the law of this state. (Sess. 24, c. 136). Now, what is required by the law of this state, in proceedings to charge bail? A *ca. sa.* must issue against the principal, into the county where he was arrested. If the *ca. sa.* is returned not found, and the proceeding is by *scire facias*, and if the bail have removed out of the state, a copy of the *scire facias* is to be left at his last usual place of abode in this state.

Now, in this case, a process issued in *Vermont*, comprising the substance of a *capias*, an execution, and a *scire facias*, and a return made thereof, and a copy was left at the last usual place of abode of the bail. This is equivalent to what is required by the act of this state; but besides this, there was a public notice for three weeks in the gazette. If the party has had the same, or as much notice as he would have had in this state, I can see no objection to giving effect to the *lex loci*. Again, if such proceedings were had, and such notice given, as is required by the common law, it will be deemed sufficient. In *England*, though no judgment can be supported against the principal, without a personal summons, yet

NEW-YORK, in proceedings *\*against bail*, no such personal summons is necessary. A *ca. sa.* may be returned *non est inventus*; and after two *nihil* returned to the *scire facias*, the bail are absolutely fixed with the debt, without any attempt whatever to give them personal notice.

ROBINSON  
v.  
Executors of  
WARD.

We are aware of the decisions in *Kilburn v. Woodworth* (5 *Johns. Rep.* 37), and of the cases there cited; but in all those cases, the judgments and proceedings were against principals, in which there had been no personal service; not against bail. There is a material distinction, in this respect, between a suit against bail, and against an original debtor.

Again, it may be observed, that the amount of damages in the case was ascertained by the recovery against the principal, and the undertaking of the bail to surrender the principal, or pay those damages, is matter of record. There is not the same reason for personal notice to the bail, as there is in the case of the principal. The bail, from the terms of the recognisance, are presumed to be in court.

*H. Bleecker*, contra. This case is not distinguishable, in principle, from those already decided, in regard to actions on foreign judgments. If the defendant had no notice in the suit abroad, the judgment cannot be enforced here. This court said, in *Kilburn v. Woodworth*, that it was against all principle to charge a person without notice. The undertaking of the bail amounts to the same, as if he had given the plaintiff a bond of indemnity. There is the same reason that bail should have notice, as any other defendant. The proceedings against bail in *Vermont* are the same as in any other suit, by writ of attachment. If it was by *scire facias*, the defendant is entitled to personal notice, for he may have a good defence; he may plead a release, or payment of the debt, &c.

\* 90 ]

\*It appears from the case, that *Ward* was not an inhabitant of *Vermont*, but was *domiciled* in this state. He was not subject to the laws of *Vermont*. He ought not to be made liable, on general principles, without personal notice; and is entitled to the protection of the laws of this state. It is no answer to say, that all the proceedings were regular and valid, according to the law of the place where the judgment was rendered; for such was the fact in all the cases in which the judgments of the foreign courts were disregarded, for want of a personal notice.

Again, it is said, the law of the two states, in proceedings against bail, are the same; so that this is not a *conflictus legum*. But the case of a *conflictus legum* is not the only one in which the *lex loci* will not be enforced. It is enough that the foreign law will produce inconvenience or injury to the inhabitants of this state. It is no answer to this to say that by the common law of *England*, or of this state, a judgment may be obtained against bail, without any personal notice of

the proceedings. That is not the ground on which the decisions on this subject rest.

NEW-YORK,  
May, 1811.

VOSBURGH  
v.  
ROGERS.

*Per Curiam.* The principle adopted by this court in the case of *Kilburn v. Woodworth* (5 *Johns. Rep.* 41), must govern the present. It was there held, that we would not sustain an action here upon a judgment in another state, where the suit was commenced by attachment, and no personal summons or actual notice given to the defendant, he not being, at the time of issuing the attachment, within the state. In the case before us, it is not positively stated that *Ward*, against whom the judgment was recovered in *Vermont*, was not at the time of issuing the attachment a resident within the state, or within the jurisdiction of the court. It is evident, however, from the facts stated in the case, that he was not. The process was served by attaching a hay-knife \*at one *Levi Burrows*, in *Bridport*; and the sheriff, in his return to the attachment, describes *Ward* as being *late* of *Bridport*; manifestly implying that he was not then a resident there. At all events, there was no personal service or actual notice. And in the case of *Kilburn v. Woodworth*, it is said, that to bind a defendant by a judgment, when he was never personally summoned, or had not notice of the proceedings, would be contrary to the first principles of justice. And whether the proceedings were valid, and according to the course of the court in the place where such judgment was obtained, or not, would make no difference, according to the case of *Buchanan v. Rucker* (9 *East*, 192.) The principle on which these decisions turn, applies to the present case, notwithstanding *Ward* was sued as *bail* in *Vermont*. The proceedings against him there were in the nature of a new suit; and the *bail* might have had a good and substantial defence to make. There is, therefore, the same reason for his having notice as in any other case. We are accordingly of opinion that the defendant is entitled to judgment.

Judgment for the defendant.

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VOSBURGH against ROGERS.

THIS was an action of *assumpsit*. The declaration was for goods sold and delivered, to wit, 300 bushels of salt, and 16 tons of *plaster of Paris*. Plea *non assumpsit*, with notice of set-off. The suit was originally commenced \*in the court of common pleas of *Columbia* county, on the 13th of *December*, 1807, and afterwards removed into this court by *habeas corpus*.

Where a cause is removed from a court of common pleas

[ \* 92 ]  
into this court by *habeas corpus*, the plaintiff may de

NEW-YORK,  
May, 1811.

VSURGH  
v.  
ROGERS.

clare in this court for a different cause of action, and for a demand which has accrued subsequent to the commencement of the suit below, and prior to the removal of the cause into this court; and the defendant may, in like manner, plead or set off any demand which has accrued subsequent to bringing the action below, and prior to its removal to this court; but he cannot plead the statute of limitations or *covverture*, or matter subsequently arising, that does not go to the merits of the plaintiff's demand. (a)

The cause was tried at the *Columbia* circuit, in *September*, 1810, before Mr. Justice *Thompson*. The defendant admitted the whole of the plaintiff's account, amounting to 442 dollars and 40 cents. It was proved that the *plaster of Paris* was sold to the defendant on the 20th of *October*, 1807, on a credit of 90 days, and the money was not, of course, due when the suit was first commenced, but it became payable a few days after, and before the removal of the cause into this court.

The defendant proved a set-off for articles sold, as stated in his account. He also proved that he sold and delivered to the defendant a pair of horses, on the 26th of *October*, 1807, for 190 dollars, for which he was to be paid in *freight*, the plaintiff being then the owner of a sloop, which plied between *New-York* and *Kinderhook*. It appeared that the plaintiff failed some time in *November*, 1807, and was not of such credit as generally to be intrusted with goods on freight.

The defendant also offered, in support of his set-off, a promissory note drawn by the plaintiff for 217 dollars and 65 cents, payable to one *Reynolds* or order, and endorsed by him to the defendant, after the suit was commenced in the court of common pleas; but before the cause was removed into this court.

The judge charged the jury, that the plaintiff having become insolvent, the defendant was not bound to request him to take goods on freight for the amount of the horses, and that the jury ought to allow the whole of the defendant's account. The jury found a verdict for the plaintiff for one dollar and five cents; but if the court should be of opinion that the note offered by the defendant ought also to be allowed as a set-off, then they found for the defendant for 216 dollars and 62 cents.

[\* 93]

\**Van Buren*, for the plaintiff. 1. The whole of the debt became due before the cause was removed into this court. Where a cause is removed by *habeas corpus*, the record is not removed, but the plaintiff must commence *de novo*. It is a new suit, and is not considered as a continuance of the suit commenced in the court below, unless for the purpose of justice, as to prevent a plea of the statute of limitations or *covverture*. (*Platt v. Platt, Col. Cases*, 36. *Salk.* 352. *Skin.* 246. 14 *Viner*, 229. *Hab. Corp.* (O). 1 *Wils.* 277.)

2. Had the defendant a right to set off the note, endorsed to him after the commencement of the suit below, though before the removal of the cause? Though, at first view, he may appear entitled to set off such a demand as well as the plaintiff to declare for a debt which had become due after the commencement of the suit, yet there is just ground for a

(a) *Acc. Bank of Niagara v. McCracken*, 18 Johns. Rep. 493. And see *Bell v. Hall*, 12 Johns. Rep. 152. *Caldwell v. Blanchard*, 14 Johns. Rep. 333. *Kirkham v. Fox*, 19 Johns. Rep. 126.

distinction. The defendant, if he removes the cause, is entitled to no favour, nor can he gain any other advantage than the delay. If he is allowed to set off a demand acquired subsequent to the commencement of the suit in the court below, he might always defeat the plaintiff's action, where it was above 250 dollars, by removing it, and pleading a set-off; and he would take advantage of his own act of delay, to defeat the plaintiff.

3. The defendant had no right to set off the price of the horses, without previously requesting the plaintiff to take goods on freight, in payment.

*E. Williams*, contra. If the plaintiff has a right to recover for a debt which was not due at the commencement of the action in the common pleas, it seems equally reasonable, that the defendant should avail himself of the right of set-off, for a demand acquired also since the commencement of the suit. Though the defendant cannot avail himself of the delay occasioned by the removal of the cause, in order to plead the statute of limitations, there is no reason why he may not plead to the merits of the action a payment or set-off.

\*The plaintiff cannot declare for a demand accruing after a *capias ad respondendum* has issued, by which the defendant is brought into court; and for the same reason he ought not to be allowed to declare in this court on a demand not due until after the *habeas corpus*, which is only another method of bringing the defendant into this court.

After the failure of the plaintiff, who had become incompetent to take goods on freight, it would be unreasonable and absurd to require of the defendant to tender him goods to carry on freight, before he could be entitled to demand or recover payment for the horses.

*Per Curiam.* It does not appear whether the plaintiff had declared in the court below, before the cause was removed into this court by *habeas corpus*; nor was that fact material, for the record is not removed by this writ, and the plaintiff declares *de novo*, in this court, and may declare for a different cause of action. The suit here is not a continuation of the suit below, technically considered, though for certain purposes of justice the court will take notice of the former suit; the plaintiff was therefore entitled to recover for the *plaster of Paris*, as that debt was due before the commencement of the suit here. (*Coleman's Cases*, 36, *Platt v. Platt*.) The next question is, whether the defendant was entitled to set off the note purchased after the commencement of the suit below, and before the suit was removed into this court. As the plaintiff is entitled to declare for a cause of action accruing after the suit below, it would be unjust not to allow the defendant to meet such new cause of action by a new defence,

NEW-YORK,  
May, 1811.

WOSBURGH  
v.  
ROGERS.

[ \* 94 ]

NEW-YORK,  
May, 1811.

WOBURG  
v.  
ROGERS.

[ \* 95 ]

perhaps accruing out of that very cause ; as where the plaintiff should declare on a new running account, or upon a transaction occurring in a course of mutual dealings. In one case the court will take notice of the former suit, so as to protect the plaintiff ; and that is the case of the plea of the statute of \*limitations ; for it would be the height of injustice to allow the defendant to defeat the plaintiff of his remedy, without his default. (1 *Syd.* 228. 2 *Salk.* 424. 2 *Ld. Raym.* 1427.) It is said to be a general rule, that the court will not suffer the defendant to prejudice the plaintiff, by removing the cause ; and, therefore, if special bail was required in the court below, and not in the court above, according to the usual course of the court ; yet, in this case, the defendant must give bail, because it was required below. (12 *Mod.* 646.) And yet, in another case, the books seem not to be consistent in the support of this principle. In *Hetherington v. Reynolds* (1 *Salk.* 8), it was ruled, that if a *feme sole* be sued in an inferior court, and after plea marries and removes the cause by *habeas corpus*, she may plead coverture in abatement to the new declaration above. It was, however, subsequently ruled otherwise in *Haddock v. Howard* (*Barnes*, 355) ; and the latter decision is certainly the most sound in principle. These pleas, then, of the statute of limitations and of coverture, are, perhaps, the only ones which the plaintiff has been permitted to defeat, by replying the suit below. And unless he be confined in his declaration, to a cause of action accruing prior to the suit below, he ought not to confine the set-off to that period. This rule, to be just, must be mutual. It may be said, that a defendant can thus defeat a valid cause of action, by removing the cause, and purchasing a note to set off against the demand. The answer is, that the plaintiff may equally increase his demand by such means ; and that he is not obliged to declare in the court above, for he cannot be nonsuited for not declaring. (a) And, perhaps, if the fact of the defendant's purchase of a note was suggested to the court, on the return of the *habeas corpus*, it might be ground for a *procedendo*, according to the intimation of the K. B. in the case of *Hetherington v. Reynolds*.

\* 96 ]

\*The next point in the case is, whether the set-off of the horses was admissible. We think it was, for the reason mentioned by the judge at the trial ; and, consequently, the judgment is to be entered for the defendant, for 216 dollars and 62 cents.

Judgment accordingly.

(a) But if he does not declare, the defendant is not bound to plead (*Cheetam v. Lewis*, 3 *Conn.* 256.)

NEW-YORK,  
May, 1811.BROWN *against* BEMENT and STRONG.BROWN  
v.  
BEMENT.

THIS was an action of *trover*, for three horses and a chair. The cause was tried at the *Columbia* circuit, in *September*, 1810, before Mr. Justice *Thompson*.

The plaintiff proved that he was possessed of the *horses and chair*, and that afterwards, on the 26th *April*, 1810, he tendered the sum of 283 dollars and 5 cents to *Bement*, one of the defendants, and demanded the horses and chair, who refused to deliver them, and referred the plaintiff to *Strong*, the other defendant. The plaintiff, on the next day, made a tender of the same sum to *Strong*, and demanded the property, but *Strong* refused, saying the horses and chair were in possession of *Bement*.

The defendants then produced in evidence an absolute bill of sale of the horses and chair to the defendants, under the hand and seal of the plaintiff, dated 27th *October*, 1809, for the consideration of 210 dollars and 35 cents. And the plaintiff gave in evidence a writing bearing the same date, executed by the defendants, by which they stipulated, on the payment of 210 dollars and 35 cents to them, by the plaintiff, in 14 days from the date, to deliver to the plaintiff the horses and chair ; but if the property was lost in the mean time, they were not to be responsible ; nor for any expenses attending the property during that time.

\*It was proved, that before the commencement of the suit, *Bement* had told the plaintiff he was willing to return the property which remained, but that one of the horses had been sold. The plaintiff answered, that if they could agree as to the price of the horse sold, that would create no difficulty.

A verdict was found for the plaintiff, by consent, subject to the opinion of the court ; and it was agreed that if the plaintiff was entitled to recover the whole property, the verdict should be entered for 438 dollars ; but if for the one horse only which had been sold, then the verdict was to be for 85 dollars ; and if the court should be of opinion that the plaintiff was not entitled to recover at all, then a judgment of nonsuit was to be entered.

Three points were raised for the consideration of the court.

1. That the writing given by the defendants to the plaintiff made the property a pledge, redeemable at any time.
2. That on tender of the money, the plaintiff's right of action was complete.
3. That the plaintiff was entitled, at least, to recover the value of the horse sold.

(a) Where goods are mortgaged, if payment be not made at the day, the interest of the mortgagor becomes absolute. *Ackley v. Finck*, 7 *Cowen*, 290.

Where *A*. gave a regular bill of sale of three horses to *B*. for the consideration of 210 dollars ; and *B*. at the same time gave to *A*. a writing or defiance, engaging, on the payment of the 210 dollars to him by *A*. in 14 days, to deliver the horses to *A*., it was held that this was a mortgage of the property, and not a technical pledge, and that *A*. not having paid nor tendered the 210 dollars, within the 14 days, the condition became forfeited, and the mortgagee had an absolute inter-

[\* 97 ]  
est in the property, so that *A*. on a subsequent tender of the money to *B*., and demand of the property and refusal, could not maintain *trover* for it. (a)

NEW-YORK,  
May, 1811.

STRONG  
v.  
TOMPKINS.

[\*98]

*E. Williams*, for the plaintiff.

*Van Buren*, contra.

*Per Curiam.* The plaintiff has not shown a right of action. Here was a complete transfer of the title to the goods in question, with a condition of defeasance, on the payment of 210 dollars and 35 cents in 14 days. This was a mortgage, not a technical pledge ; and all that was said in the case of *Cortelyou v. Lansing* (2 *Caines's Cases in Error*, 200), respecting the nature and redeemableness of pledges, has no application to the case. The distinction between a pledge and a mortgage of goods was recognised by this court in *Barrow v. Paxton* \*(5 *Johns. Rep.* 258). A mortgage of goods is a pledge and more ; for it is an absolute pledge to become an absolute interest, if not redeemed at the specified time. After the condition forfeited, the mortgagee has an absolute interest in the thing mortgaged ; whereas a pawnee has but a special property in the goods to detain them for his security. (2 *Ves.* jun. 378. 1 *Powell on Mort.* 3.) The title of the defendants here became absolute after the 14 days ; and though it does not appear whether one of the horses was sold before or after the expiration of the time to redeem, that omission is not material, as no attempt was made, in season, to redeem.

Judgment of nonsuit must, therefore, be entered according to the stipulation in the case.

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STRONG against TOMPKINS and another.

Where a deputy sheriff, instead of taking a bail bond from *A*, whom he had arrested, took from him a negotiable note, made by *B*, which *A* endorsed in blank to the deputy sheriff, for his security, and the deputy sheriff afterwards bro't an action, as endorsee, against the maker of the note, it was held, that the assignment or transfer of the note to the

[\*99]

deputy sheriff,

THIS was an action of *assumpsit*, brought by the plaintiff, as endorsee of a promissory note for 500 dollars, against the defendants, as makers, dated 29th *May*, 1807, payable to *Henry Pitcher* or order, on the 1st *May*, 1809. There was a blank endorsement to the payee, and by *Isaac Spoor*, which endorsement was made before the note became due. The cause was tried at the *Columbia* circuit, in *September*, 1810, before Mr. Justice *Thompson*.

The defendants gave in evidence a receipt, signed by the plaintiff, as follows : "Received from *Henry Pitcher*, a promissory note, drawn by *Nathaniel Tompkins* and *Nehemiah Tompkins*, payable to *Henry Pitcher* or order, dated 9th *May*, 1809, and payable the 1st *May*, 1809, which is left in my hands, to be applied to the settlement of a demand, on which he is sued, in favour of *Nicholas Kilmore*, and also to the settlement of a demand of *Henry Avery* and *Charles \*Suydam* against *Isaac Spoor*, on which said *Spoor* also is sued. It is understood that the said *Pitcher* and *Spoor*

are to attend to the entry of special bail in the said causes, in due season, and to do whatever is necessary to be done, to indemnify said *Strong*, as sheriff, in said suits, or to forfeit the amount of the said note. *Jeremiah H. Strong.*"

The plaintiff's counsel objected to this evidence, but the objection was overruled by the judge, and the evidence admitted. It was admitted, that the plaintiff was deputy sheriff, and acted as such, when he took the note and gave the receipt: and the judge was of opinion, that the evidence was sufficient to prevent the plaintiff's recovery. The plaintiff then offered to prove, that he had paid the moneys recovered by the plaintiff, in the suits mentioned in the receipt; but this evidence was overruled by the judge, who directed the plaintiff to be called, and a nonsuit to be entered, with liberty to the plaintiff to move the court to set it aside.

A motion was made to set aside the nonsuit, and for a new trial.

*Van Buren* and *Foot*, for the plaintiff, contended, that this cause was within the settled rule of law, that the maker of a negotiable note, endorsed before it was payable, could not, in an action brought by the endorsee, set up a want of consideration, or avail himself of any matter of defence arising between him and the payee.

If this was a suit between the parties, on an *obligation*, it might be within the 13th section of the act (24th sess. c. 28. [2. R. S. 286, s. 59]), which prohibits sheriffs from taking obligations, by colour of their office, other than in the form prescribed by the act. But the transfer of the note to the plaintiff was a mere authority to sue, and the defendants cannot possibly be prejudiced by the present action. Their rights are not varied, or affected, by the conduct of the plaintiff and the other parties. They ought not, \* therefore, to be allowed to set up this defence to defeat the plaintiff's action, and to avoid their own responsibility. The defendants cannot be entitled to that relief which the statute gives to the party in the suit in which the security is taken.

NEW-YORK,  
May, 1811.

STRONG  
v.  
TOMPKINS.

was illegal and void, being contrary to the statute; and that the maker might avail himself of this fact to defeat the action. (a)

[ \* 100 ]

*E. Williams*, contra. If the transaction, out of which the endorsement, or the plaintiff's right to sue, originated, was illegal, and contrary to the statute, the court will not lend its aid to enforce the payment. The statute requires the sheriff to take a bond, in a particular form, and prohibits him from taking any other; and if he does take an obligation in any other form, it is utterly void. If utterly void, how is it possible that it can be enforced?

Again, the plaintiff took the endorsement as a deputy sheriff. The assignment to him was conditional, or by way of

(a) *Vid. Love v. Palmer*, 7 Johns. R. 159, note (a).

NEW-YORK, security ; and though the condition is not expressed in the endorsement, it can make no difference ; for it was all one entire transaction, and the note being taken by the plaintiff, in violation of the statute, no right of action was assigned, or transferred, by the endorsement to him.

JACKSON  
v.  
BENJAMIN.

[\* 101]

*Per Curiam.* The plaintiff, as deputy sheriff, took the note in question, instead of taking bail of *Pitcher* and *Spoor*. He took it by way of indemnity, and under the penalty of a forfeiture of the note, if he was not indemnified ; and the note was to be applied towards the settlement of the demands for which *P.* and *S.* were sued. All this agreement was absolutely void, by the statute (*Laws*, vol. 1, p. 210. [2 R. S. 286, s. 59]) which declares, that "no sheriff or other officer shall take any obligation, for any cause aforesaid, or by colour of their office, but only to themselves, and by the name of their office, and upon condition written, that the prisoner named therein shall appear at the day and place required in the process ; \*and if any sheriff or other officer take any obligation in other form, by colour of their office, it shall be void." Though the statute speaks only of an obligation, yet it has been long settled, under the statute of 23 *Hen.* VI. of which our act is a copy, that a promise to save harmless is equally within the statute. (10 *Co.* 101. b.) The plaintiff in this case, as it appeared upon the trial, had no right of property in the note. He was not the legal holder, because the assignment to him was a nullity ; and he had no more right to sue the defendants than if the name of the payee had been forged. To give effect to such contracts would lead to the greatest abuse and oppression, and would be suffering the provision of a very beneficial statute to be eluded.

Motion to set aside the nonsuit ought to be denied.

Motion denied

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JACKSON, *ex dem.* BROMLEY and others, *against*  
BENJAMIN.

The act of 22d March, 1791, (14 sess. c. 42, s. 11,) sometimes called the *Canaan act*, granted the lands only to those who were

[\* 102]  
in possession, in their own

THIS was an action of ejectment, for eight-thirteenths of a farm, in *Chatham*, in the county of *Columbia*. The cause was tried at the *Columbia* circuit, in September, 1810, before Mr. Justice *Thompson*.

It was proved that *Benjamin Ingraham* was in possession of the premises about 45 years ago ; that he sold them to *Ebenezer Benjamin*, who, a few years before his death, put his son, the present defendant, in possession, who has continued to reside thereon ever since that time, or about 27 years

*Ingraham* held the premises as his own property. The present defendant afterwards used them as his own property. The lessors of the plaintiff are the heirs at law of *Ebenezer Benjamin*. The deed from *Ingraham* to *Benjamin* was dated the 12th *December*, 1782. *Ebenezer Benjamin* died in *October*, 1789, and just before his death the defendant applied to him for a deed of the premises, but he refused to give it. Until the act of the legislature relative to the lands in *Canaan*, which then included *Chatham*, was passed, in 1791, no deeds were given for those lands except quit-claim deeds. When that act was passed, the defendant was in possession of the land, claiming it as his own.

On the 28th of *September*, 1808, the defendant executed a bond to the lessors, as heirs at law of *Ebenezer Benjamin*, conditioned, that if the heirs would release to him the premises in question, he would release to them all his right to the residue of his father's estate; and some of the heirs have accordingly released to the defendant.

It was also proved, that *Ebenezer Benjamin*, in his lifetime, had said, that he purchased the farm for the defendant, and that it was his; that the defendant paid 200 dollars, by the request of his father, as part of the consideration for the farm. The defendant took possession immediately after *Ingraham* sold it to his father, who never was in actual possession of it. That it was agreed between the defendant and his father, about a year before the death of the latter, that the defendant should pay 250 dollars, and his father would give him a deed.

The defendant also read in evidence the act of the legislature, passed the 22d of *March*, 1791 (*Greenleaf's* ed. of *Laws*, vol. 2, p. 368, 370), which declares, "that all the estate, right, title, interest, claim, and demand of \* the people of the state of *New-York*, of, in, and to any lands, tenements, or hereditaments, in the town of *Canaan*, in the county of *Columbia*, now possessed by any person or persons, shall be, and hereby is, granted to the respective possessors of such lands, &c. and to the heirs and assigns of such possessors respectively for ever. Provided always, that such possessor or possessors shall be construed, and taken to be, the person or persons holding in his or her own right, and not occupying or improving in the right of another."

A verdict was found for the plaintiff, subject to the opinion of the court.

*Van Buren*, for the plaintiff.

*E. Williams*, contra.

*Yates*, J. delivered the opinion of the court. The act of the 22d *March*, 1791 (14th sess. c. 42, s. 11), relative to the subject in controversy, declared that all the rights of the peo-

NEW-YORK,  
May, 1811.

JACKSON  
V.  
BENJAMIN

right, and not occupying in the right of another. Where *A.* bought land in *Canaan* in 1782, and put *B.*, one of his sons, in immediate possession, and declared he had bought it for him, and afterwards died in 1789, leaving several children, his heirs at law, and *B.* continued in possession of the land above 27 years, but without having obtained a deed from his father; it was held, that *B.* was in possession under his father, and not in his own right, or adversely to his father; and that the act of 1791 confirmed the right to the land in the heirs of *A.* generally,

[\* 103]  
on whom the law cast the inheritance; and that the rest of the children of *A.* were entitled to their proportion of the land so occupied by *B.*

NEW-YORK,  
May, 1811.

HOGLE  
v.  
STEWART.

[\* 104]

ple of this state to any lands in *Canaan* (which then included *Chatham*), and then possessed by any person, was thereby granted in fee to such possessors; but with a proviso, that such possessors should be construed and taken to be the persons *holding in their own right, and not occupying and improving in the right of another*. From the facts disclosed in this case, I think it is evident, that the defendant entered under his father, and always, until his father's death, occupied and improved in right of his father. *Ebenezer Benjamin* purchased the land and took a deed, and settled the defendant, his son, upon it, immediately. If he intended that it should be the defendant's, why did he not take the deed in his name, at once? He never parted with his right, nor does it appear that the son ever meant or intended to hold independent of, or adversely to, his father's \*right. He must, consequently, be deemed to hold under that right, as one of the heirs. There is no fact showing that he had set up an independent right in himself; and the bond which he executed to the heirs, so late as the year 1808, shows conclusively, that he still continued to possess under his father's title, as one of the heirs; nor can the right of those heirs be at all affected by the act of 1791. That act only went to confirm the right of the heirs generally; for the law had cast the inheritance upon them; and the possession of the defendant, as one of the heirs, could not destroy the right of the others; but must be considered as the possession of all of them.

Judgment ought, therefore, to be rendered for the plaintiff.

Judgment for the plaintiff.

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HOGLE, Widow, &c. against STEWART.

The act limiting the period of bringing claims and prosecutions against forfeited estates, passed the 29th March, 1797 (11th sess. c. 52), does not extend to or bar the claims of the widows of persons attainted for their dower in the estates forfeited and sold by the commissioners of forfeitures.

[\* 105]

THIS was an action of *dower*, brought by the defendant, to recover her right of dower as the widow of *John Hogle*, in 110 acres of land, situate in the town of *Cambridge*, in the county of *Washington*. The writ was returnable in November term, 1808.

The defendant was married to *John Hogle*, some time before the commencement of the late war between this country and *Great Britain*. *John Hogle* was seised of the premises in question, during the coverture, and he died seised and in possession of the premises in the year 1777, and *Elizabeth Hogle* has continued a widow ever since. *John Hogle* was duly attainted, for adhering to the enemies of this state, in the late war. On the 25th of *February*, in the year 1781, the commissioners of forfeitures for the western district, sold the premises of \*which dower is demanded, for the consideration

of £330 to *Nathaniel Henry*, on the conviction of *John Hogle*. *Henry* conveyed to the tenant, who has held the same ever since, under that title.

A case containing the above facts was submitted to the court without argument; and it was agreed that if the court should be of opinion that the defendant is entitled to recover, then judgment should be entered that she recover her dower. If not, then judgment of nonsuit was to be rendered.

NEW YORK,  
May, 1811.

HOGLE  
v.  
STEWART.

*VAN NESS*, J. delivered the opinion of the court. The forfeiture of the husband's estate, by his attainer, did not affect the wife's right of dower (*Palmer v. Horton*, 1 *Johns. Cas.* 27). The estate that was sold by the commissioners of forfeitures, was the estate of the husband only; the wife's right of dower remained as perfect as if no forfeiture had ever been incurred.

The question then arises, whether the statute of the 29th *March*, 1797 (3 R. S. 348), limiting claims and prosecutions against forfeited estates, applies to a case of *dower*. I think it clearly does not. It is true that the state is bound to defend the purchasers of forfeited estates against all claims whatsoever. The deeds given by the commissioners of forfeitures, were for an absolute estate; but as it was known that the attainer did not impair the widow's right of dower, the state intended to indemnify the purchaser against such right, whenever it should be made and enforced. The words of the 1st section of the statute are, "that no persons, &c. who now have, or shall, or may hereafter have, any estate, right, title, claim, or demand, to any lands, &c. supposed to have been forfeited, &c. and which have been heretofore granted or conveyed to any person, &c. shall, after the expiration of five years from and after the passing of this act, &c. prosecute, sue, or maintain any action or suit at law for the recovery thereof, *against the right and title so granted* \*by the people of this state as above said." The second section is, "that if any person, &c. shall, &c. after the period of five years, sue or prosecute any suit, &c. for any of the said lands, &c. so as aforesaid granted, &c. such person, &c. sh<sup>l</sup>l from thenceforth be utterly barred for ever of all and every such suit, &c. *against the right or title so granted* or conveyed by the people of this state as aforesaid." Although the provisions of this act are loaded with a great number of words, yet none of them reach this case. The words that no person who at the time of passing the act had any estate, &c. in any lands forfeited and conveyed by the commissioners, shall, after the expiration of five years from the passing of this act, prosecute, &c. might, perhaps, embrace this case, were they not qualified and restrained by what follows. I think there is some doubt, however, even upon this part of the act, because the estate spoken of is the estate in lands *forfeited and conveyed*, whereas the

[\* 106]

NEW-YORK,  
May, 1811.

HOGLE  
v.  
STEWART.

widow's estate never was forfeited and conveyed. But however this may be, it is, I think, demonstrable, that when the remaining part of the same section is taken in connection with the part just adverted to, that the widow's right is completely excluded: No action shall be prosecuted or maintained, after the expiration of five years, *against the right and title granted by the commissioners*. The right of dower is neither adverse to the estate forfeited, nor is it "*against the right and title*" granted by the state, but is in concurrence with both. The seisin of the purchaser from the state is derived from the husband, and is a continuation of that seisin upon which the claim of dower is founded. If this construction of the first section of the act be correct, it is obvious that the second section creates no bar to this suit.

[ \* 107 ]

This construction of the act is fortified by a recurrence to the mischief which it was intended to remedy, as disclosed by the preamble, which recites, that "whereas the title deeds and other documents relative to forfeited \* estates, were generally carried away by the former proprietors, whose conduct caused their forfeiture, and the title of the state, *as resulting from such forfeitures*, is therefore peculiarly liable to be, obscured or defaced; therefore it is enacted." This case does not fall within any of the reasons enumerated in the preamble. Indeed, when all the statutes on the subject are carefully examined, it is clear the legislature never intended to apply the short and rigorous limitation of the statute of the 29th *March*, before noticed, to any cases except those in which claims were made against the right which had been acquired by the state, in consequence of the attainder of persons adhering to the enemies of the country. The statute was passed in reference to such claims only, and never was intended to extend so far as to bar a claim or interest which never had been either forfeited or sold.

There ought, therefore, to be judgment for the defendant

SPENCER, J. I cannot concur in the opinion just given. The act of the 28th of *March*, 1797, in my opinion, is a bar to the defendant's recovery. The preamble to that act cannot control the operation of the strong and express language of the enacting clause. The cases are numerous, clear, and decided, in support of this principle; and, without quoting, I refer to Lord *Hardwicke's* opinion in *Basset v. Basset* (3 *Atk.* 203). *The King v. Athos* (8 *Mod.* 144). Mr. Justice *Buller's* opinion (4 *Term Rep.* 793), and to Lord *Mansfield's* opinion in *Patterson v. Banks* (*Cowp.* 543).

The enacting words are full and explicit: "*no person who then had, or might thereafter have, any estate, title, claim, or demand in or to any lands*," &c. supposed to have been forfeited by any attainder or conviction during the late war, and which had theretofore been granted by the commissioners of

forfeitures, &c. shall, after the expiration of five years from the passing the act, &c. \*have, prosecute, or maintain any action or suit at law, for the recovery thereof, against the right granted by the people of this state," &c.

NEW-YORK,  
May, 1811.  
VAUGHAN  
v.  
HAVENS.

Does the act include the demand of dower, and is it a suit for the recovery of lands forfeited by attainder, against the right granted by the state? It cannot require any argument to show, that the present suit is a claim or demand in or to the lands which have been granted by the state; for, on a recovery, the defendant has her writ of seisin, and must be put in possession of one third of them. That it is a suit for the recovery of lands, against the right granted by the people, will be manifest, by adverting to the acts of the 22d of *October, 1799* (1 *Green.* 26), and of the 12th of *May, 1784*, (1 *Green.* 127.) By these acts, the conveyances given by the commissioners are declared to operate as warranties from the people to the purchasers, against all claims, titles, and encumbrances whatever. The case then stands thus: the people, by their commissioners, have sold the land whereof dower is sought, in *allodium*, and they have warranted it against all claims, titles, and encumbrances. If the defendant has judgment, this warranty is broken, and the state is bound to an indemnity. This suit then is directly adverse to the right granted by the people; because they have undertaken to grant these lands as absolutely their own, and against every claim and encumbrance; and this brings the case precisely within the letter and spirit of the act. It is in vain to say, that the widow's dower is not a claim adverse to the title *acquired* by the state. Is it adverse to the right granted by the state? That is the real question.

I cannot perceive, neither, why we should do away the obvious meaning of the legislature, which was to establish a short statute of limitation, in favour of a claim so stale as is the present. The act is a constitutional one. \*The defendant has slept on her rights until they are forfeited and gone, and I am not disposed to help her by overruling an act of the legislature.

[\* 109]

#### Judgment for the defendant.

#### VAUGHAN against HAVENS.

IN error, from the court of common pleas of *Essex* county.

This was an action of *slander*. The declaration contained six counts. The first, second, third, and fourth counts, charged the defendant below with having said of the plaintiff below, "You swore false: You took a false oath." (Meaning that

To say of a person, "he has sworn false," or "has taken a false oath," is not actionable; and the mean-

NEW-YORK,  
May, 1811.

VAUGHAN  
v.  
HAVENS.

ing of the words cannot be enlarged by an *innuendo*. Yet these words may be aided so as to support the declaration, if the defendant in his *plea* of justification, allege or confess that he spoke the words by reason of a false oath taken by the plaintiff in a court of competent jurisdiction. But

[ \* 110 ] if the defendant plead the general issue, and gives notice of his justification, the notice will not help the declaration, for it is not considered as a special plea, nor does it form any part of the record.

he had perjured himself.) The fifth and sixth counts charged the defendant with saying of the plaintiff, " You have been guilty of perjury." The defendant below pleaded the general issue, with a notice that he would prove, at the trial, that the plaintiff had committed perjury, on the execution of a writ of inquiry, before the sheriff.

There was a general verdict on all the counts, on which the court below gave judgment. The case was submitted to the court without *argument*.

SPENCER, J. delivered the opinion of the court. It has been frequently decided in this court, that to charge a person with having sworn false is not actionable, unless there be a *collateral* (and there is none in this case,) concerning a proceeding in a court of competent jurisdiction, and the words are alleged to have been spoken in reference to that proceeding. (a) It has also been repeatedly decided that an *innuendo*, enlarging the natural meaning and import of the words, is inadmissible and naught. (b)

\*It is also well settled, that when the verdict and judgment are general, and there are some bad counts, the judgment must be reversed; because it is impossible to say whether the damages have not been given on the bad counts, as well as on those which are good.

The principal reliance for the affirmance of the judgment, is on the case of *Drake v. Corderoy* (Cro. Car. 288), in which it was held, that "where the declaration is uncertain, but the defendant, by a special plea on which issue is taken, confesses that he spoke the words, by reason of the plaintiff's oath taken at the sessions, and justifies the plea, that clears the question whereof he intended to speak." The case cited would apply and warrant an affirmance of the judgment, if the notice annexed to the plea could be considered in the light of a special plea; but it cannot. The notice is intended for the ease and benefit of the defendant. He may, or he may not, rely upon it. It has been uniformly held, that it is not an admission of the matters charged in the declaration. The plaintiff is bound, notwithstanding the notice, to prove the facts set forth in the declaration. The notice forms no part of the record, and cannot, therefore, be considered as a special plea, which admits and avoids the cause of action set forth by the plaintiff.

The Judgment must be reversed.

(a) See 1 *Johns. Rep.* 505, 506. 2 *Johns. Rep.* 10. 1 *Gaines*, 347. [Chapman & Smith, 13 *Johns. Rep.* 78.]

(b) The office of an *innuendo* is merely explanatory. It cannot enlarge the meaning of words beyond their natural signification. *Goodrich v. Woolcott*, 3 *Cowen*, 231.

NEW-YORK,  
May, 1811SMITH  
v.  
JANSEN.\*SMITH and others *against* JANSEN.

IN error, from the court of common pleas of *Ulster* county. The declaration in the court below was in *debt*, for 54 dollars and 33 cents, on a bond dated the 18th *September*, 1807, given for the *gaol liberties* granted to *Smith*, one of the defendants below, who was committed to gaol on three executions, issued by a justice of the peace, amounting in the whole, with the officer's fees for poundage, &c. endorsed thereon, to 27 dollars and 16 1-2 cents. The defendant, after craving *oyer*, and setting forth the condition of the bond, demurred to the declaration, and the plaintiff joined in demur-*rer*. The court below gave judgment, on the demur-*rer*, for the plaintiff; but stayed the entry of the judgment, until the damages should be assessed on a breach to be suggested. The plaintiff then suggested a breach on the record, that *Smith* did not remain a true and faithful prisoner, according to the condition of the said bond; but escaped and went without the liberties of the gaol, &c. A *venire* was thereupon award-*ed*, and a jury summoned, who found the truth of the breach suggested, and assessed the damages of the plaintiff, to 27 dollars and 16 cents, and his costs at six cents. The court gave judgment thereon *for the debt*, and six cents costs, together with the damages assessed by the jury, and also for 31 \*dollars and 78 cents costs, adjudged of increase, which damages in the whole amount to 59 dollars.

*Sudam*, for the plaintiff in error. 1. The bond is void, by the statute [2 R. S. 433, s. 41] being taken for more than double the amount for which *Smith* was committed.

2. The bond being taken merely for the indemnity of the sheriff, the breaches assigned should show how much he has been damnified. (*Bos. & Pull.* 312.) This is not a case in which the plaintiff can recover nominal or technical damages, but he must show actual damage. Admitting the plaintiff may recover nominal damages, yet as he proved no actual damage, he is entitled to no more. (5 *Johns. Rep.* 42.)

3. The judgment is erroneous, being in *assumpsit*, and not in *debt*, and includes a sum beyond the penalty of the bond.

4. The form of the judgment on the demur-*rer* is erroneous. Instead of saying, "therefore it is considered that the plaintiff

Where the penalty of a bond for the gaol lib-  
erties was tak-  
en for more  
than double the  
debt and costs  
for which the  
prisoner was  
committed; but  
the excess con-  
sisted of the  
officer's fees on  
the execution; this  
was held a good  
bond within the  
statute.

In an action  
of debt on such  
bond, the sug-  
gestion of the  
breach generally,  
in the words  
of the condition  
is sufficient,  
without alleg-  
ing the particu-  
lar damages. (a)

Where there  
was a demur-  
re to a declaration  
on such a bond,  
and the court

[ \* 112 ]  
adjudging the  
declaration to  
be sufficient, the  
entry on the re-  
cord was, that  
the judgment  
on the demur-  
re should be stay-  
ed until the truth  
of the breach  
to be sug-  
gested should  
be ascertained,  
and the dam-  
ages assessed;  
this was held to  
be correct with-  
in the statute,  
(24 ses. c. 90, s.  
7. [2 R. S. 433,  
s. 41]) which is  
to receive a  
liberal and ben-  
eficial construc-  
tion. The sug-  
gestion of  
breaches may  
be before a for-  
mal entry of

(a) *Vid. People v. Brush, 6 Wendell, 454.*

NEW-YORK,  
May, 1811.

SMITH  
v.  
JANSEN.

judgment on  
demurrer, &c.

But where, in  
the final judg-  
ment, the court  
of common

pleas gave  
judgment for  
the debt, and  
six cents costs,  
together with  
the damages  
assessed by the  
jury, and also  
the costs of suit  
adjudged of in-  
crease; this was  
held erroneous,  
and the judg-  
ment of the  
court below  
was reversed as

[\*113]

to the sum as-  
sessed for dam-  
ages, but suffer-  
ed to stand  
good as to the  
debt and costs,  
including the  
costs of assess-  
ment; and nei-  
ther party in  
this case was  
held to be enti-  
tled to costs on  
the writ of er-  
ror. (a)

ought to recover his damages;" the court below, after saying that the declaration was sufficient, &c. proceed: "but because it is convenient and necessary that judgment hereof should not be given, until the truth of a certain breach hereafter suggested shall be inquired into, and the damages which the plaintiff has sustained by reason of that breach be assessed by a jury, &c. let judgment be stayed until such time as the premises shall be ascertained as aforesaid." (1 *Saund.* 58, note 1.)

5. The recovery is not only for the debt, and six cents costs, but also for the damages assessed by the jury; and the costs of executing the writ of inquiry are stated to be costs of increase. (2 *Saund.* 187, note. *Doug.* 49. 2 *Bl. Rep* 1190. 6 *Term Rep.* 303. 2 *Term Rep.* 388.)

*Van Vechten*, contra. 1. Most of the errors assigned are amendable; and there is something by which the amendment can be made. This court will do what is right and just, and not suffer the party to be prejudiced by mere form.

\*2. It is sufficient to assign a breach in the words of the condition or covenant; and the objection is not good after a verdict or inquisition.

3. The plaintiff states all the sums for which the prisoner was confined; and the bond is only double the amount, including the constable's fees. This can never be considered as a violation of the statute.

4. The form of the judgment is amendable, and the court may correct it.

KENT, Ch. J. delivered the opinion of the court. 1. The first error alleged by the counsel for the plaintiff, is, that the bond was void, as it appears to have been taken for more than double the sum for which *Smith* was committed. The penalty of the bond is 54 dollars and 83 cents, and the amount of the three justices' executions against *Smith* (including poundage, mileage, serving execution, and other fees, endorsed on each execution,) was 27 dollars and 16 cents. These several items amounted to 93 cents upon each execution, and the question is, whether they were part of the sum for which the prisoner was confined. He was to remain in gaol, according as the law stood in September, 1807, (*Laws of N. Y.* 28th sess. c. 93) until "the judgment with all taxable costs were fully paid;" (*Vid.* 2 *R. S.* 249, sec. 131. 2 *R. S.* 376, s. 76.) and the bonds for the gaol liberties were to be in double the

(a) *Bradshaw v. Callaghan*, infra, 558. *Anon.* 12 *Johns. R.* 340. *Richard v. Walton*, 12 *Johns. R.* 434. *Seward v. Jackson*, 8 *Cower* 406.

amount of "the sum for which the prisoner was confined." (2 *R. S.* 433, sec. 41.) According to the opinion of this court in *Dole v. Moulton* (2 *Johns. Cases*, 206), the poundage and fees of execution, as well as the sum in the execution, were to be paid by the debtor, before he was discharged. What was the amount of the mileage for serving the execution does not appear, and cannot be ascertained from the record, for it is not stated at what distance from the gaol of the county the execution was served by the constable. There are 93 cents charged on each execution, in addition to the \*amount of the judgment itself, and the 19 cents for the execution; and, for aught that appears, the lawful charges of the constable might have been that sum, and the whole costs not exceed 5 dollars. The sheriff, when he took the bond, would naturally look to the amount of the debt and costs, endorsed on the execution. He never would think of scrutinizing into the accuracy of the precise amount of the costs; and the prisoner *Smith*, and his sureties, by giving the bond in exactly double the amount of the debt and costs charged on each execution, must have acquiesced in the correctness of the sum. When there is no allegation or pretence of extortion, or undue means exercised by the sheriff, in procuring the bond, it is right and just that the obligors should be concluded by that acquiescence; and such was the opinion of the court, in the case of *Dole v. Moulton*, already referred to.

2. The next error suggested, is, that a competent breach is not assigned. The breach suggested is, that the prisoner did not remain a true and faithful prisoner, according to the condition of his bond; but that he escaped without being discharged by due course of law. This suggestion assigns the breach generally, by negativing the words of the condition, and when such a general assignment *necessarily* amounts to a breach, it is sufficient. (5 *Johns. Rep.* 174.) The suggestion goes beyond the case of an accidental or involuntary escape, for it alleges that the prisoner did not remain true and faithful, but escaped. And if the fact of a voluntary escape (as this must be taken to be) be once established, the condition of the bond is broken, and the bond forfeited. So it was declared by the court, in *Woods v. Rowan* (5 *Johns. Rep.* 42.) The rest was a mere question of damages, and rested upon the proof to be produced to the jury. The assignment states a cause of action, by alleging a breach in fact, and that was \*enough to sustain the action, and to entitle the plaintiff to recover some damages. The question of the excess of damages never can be examined upon a writ of error. The evidence is not spread upon the record.

3. The other errors alleged, are merely formal. They go to the form of the record, and do not touch the merits of the

NEW-YORK,  
May, 1811.

SMITH  
v.  
JANSEN.

[ \* 114 ]

[ \* 115 ]

NEW-YORK,  
May, 1811.

SMITH  
v.  
JANSEN.

case. It is said, that there is no judgment upon the record, after the demurrer, and before the assignment of breaches. The form in 1 *Saund.* 58, *note 1*, gives a judgment in such case; yet the entry goes on immediately to say, that it is convenient that judgment should not be given, but should be stayed until the breaches are assigned and the damages assessed. The record before us is more consistent and rational. It omits the entry of the judgment, and declares it to be postponed until, &c. This is agreeable to the truth and history of the proceeding. The statute does not mean, that the formal entry of judgment in cases of demurrer, or by confession, or *nil dicit*, is requisite *before* the entry of the suggestion of breaches. A previous determination upon the demurrer is sufficient. The statute, as the court of K. B. said in *Ethersey v. Jackson* (8 *Term Rep.* 255), is to receive a liberal and beneficial construction; and that as the statute enabled the plaintiff to enter a suggestion on the record, even after judgment, *à fortiori* it might be done before.

The only remaining difficulty is as to the form of the final judgment. It would seem to be the better construction of the act, that the assessment is only to regulate the sum to be levied on the execution, and that the judgment is to be entered as if there had been no assessment of damages; for the statute says, the judgment is to be entered as "*heretofore*." The judgment would, therefore, be for the penalty, which is the debt and the costs, in which may be included the costs of the assessment of the damages. This is the construction given to the act by Serjeant *Williams*. (1 *Saund.* 53, *note 1*. \*2 *Saund.* 187, *notes a, b, c.*) Independent of authority, it would appear to be consistent with the end and design of the statute, that the judgment should be pronounced on the damages assessed; for the plaintiff is bound to have his damages assessed, and to put that assessment upon the record (4 *Johns. Rep.* 214), and he cannot recover beyond the assessment. But the course of precedent and decision is according to the *letter* of the statute, and ought now to be followed. In the present case, the judgment is, as usual, for the debt and costs, but it is also for the 27 dollars and 16 cents, assessed by the jury. In this consists the *gravamen*. The case of *Hankin v. Broomhead* (3 *Bos. & Pull.* 607), is very much in point, to prove that the judgment for the sum assessed, in addition to the judgment for the original debt, is erroneous; and Lord *Alvanley* approves of the form of entry suggested by Serjeant *Williams*. We are therefore under the necessity of reversing the judgment upon the assessment, for the 27 dollars and 16 cents; and leaving it unimpeached as to the debt and costs, including the costs of the assessment. The judgment here consisting of distinct parts, may be reversed as to

[\*116]

one part only. (*Str. 188. 2 Ld. Raym. 893, 1534.*) The NEW-YORK,  
judgment of reversal must, therefore, be entered with this limitation; and neither party will be entitled to costs upon the writ of error.

May, 1811.

COLE

v.

WENDEL.

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COLE against WENDEL.

THIS was an action of *assumpsit*. The declaration contained a count of sixty shares of stock in the bank of *Hudson*, sold and delivered for one thousand dollars; and a *quantum valebant* thereon. There was also a count on a written contract, signed by the defendant, dated *July 28, 1809*, as follows: "I promise hereby to take from Mr. *Peter Cole*, sixty shares of the stock in the bank of *Hudson*, if legally transferred to me, for which I promise to deliver him his note of six hundred and sixty-seven dollars, and pay the balance, in cash, on said stock; and I promise to pay an advance of five *per cent.* when received by me."

On the 5th of *September, 1807*, *Cole* transferred to *Wendel*, on the books of the *Hudson* bank, sixty shares of stock, on each of which no more than 10 dollars had been paid. The defendant was not present at the transfer, but resided in the city of *New-York*. A receipt was given by the attorney of the defendant to the plaintiff, as follows: "Received of *Peter Cole* a certificate of the cashier of the *Hudson* bank, for sixty shares of stock, subject to the further payment of forty dollars on each share, which stock is certified to *John G. Wendel*, and I hold the same subject to such final settlement as *Mr. Cole* and *Mr. Wendel* may make. *December 28, 1809.*" The attorney of the defendant, when he gave the receipt stated that he took the certificate as collateral security only for the note of *Cole* to *Wendel* for 667 dollars, put in his hands for collection. The plaintiff offered the certificate to the defendant, if he would allow five *per cent.* on the full amount of the share; but the defendant refused to allow the five *per cent.* on more than the ten dollars paid in on each share; but offered to give up the certificate and re-assign the stock, on payment of the note. The plaintiff refused to accept the certificate or pay the note.

A witness was called to prove that when the written agree-

*A., by a written contract, agreed to receive of B. 60 shares of the Hudson bank, on which 10 dollars per share had been paid, and to deliver B. his note for 667 dollars, and pay him the balance in cash; and also to pay 5 per cent. advance. The nominal amount of each share being 50 dollars, parol evidence was held admissible to explain the written contract, or whether the 5 per cent. advance was to be paid on the sum paid in on each share only, or on the nominal amount. (a)*

(a) How far the expressed consideration of a written contract may be varied by parol proof, see *Schermerhorn v. Vanderheyden*, 1 Johns. Rep. 139. *Shephard v. Little*, 14 Johns. Rep. 210. *Bowen v. Bell*, 20 Johns. Rep. 338. *Maigley v. Haner*, 7 Johns. Rep. 341. *Spencer v. Tilden*, 5 Cowen, 144.

NEW-YORK,  
May, 1811.

COLE  
v.  
WENDELL.

[ \* 118 ]

ment was signed by the defendant, the defendant agreed to allow the five *per cent.* on the whole amount, or on fifty dollars for each share ; and the witness who drew the \*contract, was requested so to state it. This evidence was objected to, but admitted by the judge. It appeared that if five *per cent.* was allowed on the sum only actually paid in on the shares, there would be nothing due to the plaintiff, but a balance due to the defendant. The judge charged the jury that the plaintiff was entitled to recover for his stock, and that five *per cent.* was to be added either on the ten dollars paid in, or on the nominal amount of fifty dollars for each share, which they must determine ; and the jury found a verdict for the largest sum.

The defendant moved for a new trial : 1. Because the *parol* evidence to explain the written contract ought not to have been received.

2. For the misdirection of the judge.

*E. Williams*, for the defendant.

*Van Buren*, contra.

SPENCER, J. delivered the opinion of the court. The only question presented by the case is, whether it was competent to the plaintiff to explain, by *parol*, whether the five *per cent.* advanced on the shares, was to be on the sum then actually paid in (which was ten dollars on each share), or on the nominal amount of the shares. The terms of the contract are equivocal, and the ambiguity is a latent one ; as such, and on the strictest principles, the circumstances of the case may be proved and taken into consideration, in determining how the five *per cent.* advance was to be calculated. (*Peake's Evid.* 112.)

There is, moreover, intrinsic evidence that the five *per cent.* advance was to be calculated on the nominal amount of the shares. The plaintiff owed the defendant six hundred and sixty-seven dollars on a note ; the defendant agreed to accept sixty shares, on each of which ten dollars had been paid, to pay an advance of five *per cent.* deliver up the note, and pay the balance in cash ; but if the five *per cent.* was to \*be allowed on the ten dollars paid on each share, there would be no balance to be paid by the defendant, but the plaintiff would still remain in debt. It is evident, therefore, that the parties

[ \* 119 ]

contemplated that the advance should be on the nominal NEW-YORK,  
amount of the shares. May, 1811.

Motion denied. (a.)

ROGERS  
v.  
WARNER.

(a) The difficulty here, as in many other cases, consists more in the due and correct application of principles to the given case, than in ascertaining and defining the principles themselves. It is a general and settled distinction running through all the cases on this subject, that extrinsic evidence cannot be received to contradict, vary, or add to, an instrument in writing, but only to explain and elucidate it, and this only in the case of a latent ambiguity. *Pr. Thompson, Ch. J.* delivering the opinion of the court in *Jackson v. Sill*, 11 *Johns. Rep.* 215. A latent ambiguity is such as arises from evidence *dehors* the instrument. *Tole v. Hardy*, 6 *Cowen*, 333.

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**ROGERS and LAMBERT against WARNER and BOSTWICK.**

THIS was an action of *assumpsit*. At the trial, the plaintiff gave in evidence the following writing, signed by the defendants: "Messrs. *Rogers & Lambert*, if *Elias Warner* and *D. W. Bostwick*, our sons, wish to take goods of you on credit, we are willing to lend our names as security for any amount they may wish. *Canaan, May 3, 1804.*" After the delivery of this letter of credit to the plaintiffs, the persons in whose favor it was written took goods of the plaintiffs several times, on credit, for which they paid, from time to time, and for which no notes were given. In *December*, 1805, they took another parcel of goods, for which they gave their note, on which a balance remained due to the plaintiffs of two hundred sixty-seven dollars and ninety-four cents. A verdict was taken for the plaintiffs, subject to the opinion of the court, on the single question, whether the defendants were liable for that sum, on the letter of credit.

*A. & B.* addressed a letter of credit to *C.*, saying, "If *D.* wishes to take goods of you on credit, we are willing to lend our names as security for any amount he may wish. *May 3, 1804.*" *D.* took goods of *E.* on credit several times, for which he paid; and in *Dec. 1805*, took another parcel of goods on credit, for which he gave his note to *C.*, which was not paid. In an action brought by *C.* against *A. & B.* it was held that the letter of credit did not extend beyond the first parcel of goods delivered to *D.*, and that *A. & B.* were not liable for an indefinite time,

*H. Bleecker*, for the plaintiffs, cited *Hutchinson v. Bell*, (1 *Taunton's Rep.* 558.)

*E. Williams*, contra

\**Per Curiam.* The true construction of the letter of credit is, that it is to be confined to the first parcel of goods. It would be unjust and unreasonable to extend it to an indefinite time,

NEW-YORK,  
May, 1811.

TEN EYCK  
v.  
VANDERPOEL.

but only to an  
indefinite a-  
mount for one  
time.

nite credit for an indefinite time. The plaintiffs did not, probably, understand it so; for after goods had been, at several times, taken up on credit and paid for, they took a note for the last parcel, which was above a year and a half after the first transaction. This is a very different case from that of *Hutchinson v. Bell* (1 *Taunton*, 558,) for that was a case of a fraudulent representation, and the defendant there was held to be liable only within a reasonable time. Here the letter of credit was given in good faith. It must have been intended as an introduction for their sons to business and credit. The natural inference is, that a continuing credit was to depend on the future conduct of the sons. The letter gave an unlimited credit as to amount. Here it was explicit, but was silent as to the continuance of the credit to future sales. *Expressio unius est exclusio alterius.* Judgment ought to be given for the defendants.

Judgment for the defendants.

TE v EYCK and others *against* VANDERPOEL.

Where *A.*, as administrator of *B.*, deceased, gave a [ \* 121 ] promissory note to *C.* by which he "promised to pay *C.* 61 dollars and 72 cents, for value received by *B.* and his heirs, on demand, with interest until paid," the note was held to be void for want of a consideration. (a)

THIS was an action of *assumpsit*. The declaration was on a promissory note, made by the defendant, on the 18th May, 1809, by which the defendant, "as administrator of Peter Bregau, deceased, promised to pay the \*plaintiffs sixty-one dollars and seventy-two cents, for value received, by John Bregau and heirs, on demand, with lawful interest until paid." There was a demurrer to the declaration and joinder in demurrer, which was submitted to the court without argument.

*Per Curiam.* The declaration does not state a consideration for the promise. The defendant, as administrator, promises to pay a debt in the right of others. The note states, that the value received was by third persons, and there is no consideration or inducement for the promise. The writing repels any presumption of consideration from the words "value received," because it admits that the value was received by "John Bregau and his heirs," and the defendant signs as administrator. The case of *Rann v. Hughes* (7 *Term Rep.* 350, note. 7 *Bro. C. C.* 550,) is in point. Judgment must be for the defendant.

(a) *Acc. Schoonmaker v. Roosa*, 17 *Johns. Rep.* 301.

NEW-YORK,  
May, 1811.MILLS  
v.  
TWIST.

THIS was an action of *assumpsit*. The action was founded on a written contract, to the execution of which there were two subscribing witnesses, who were the sons of the defendant.

At the trial, at the *Washington* circuit, in 1809, the plaintiff proved that the defendant lived sixteen miles from the county court-house; that one of the witnesses was under age, and lived with the defendant, and the other worked in a shop at a short distance from the defendant's house. On *Monday*, before the trial, the plaintiff went with a *subpœna*, and inquired of the defendant for \*his two sons, the witnesses, and the defendant said they had gone, a few days before, on a journey to the westward, and he did not know when they would return. The plaintiff proved, that one of the witnesses was seen at the defendant's house, in the morning of the day he called, or during the evening before; and an officer was employed on *Tuesday*, the next day, to make diligent search for them, in order to serve the *subpœna*, and that the witnesses could not be found. The plaintiffs, who resided in *Connecticut*, then offered other testimony to prove the contract; and also offered parol evidence of the agreement, but this was objected to by the defendant's counsel, and rejected by the judge, and the plaintiffs were nonsuited. A motion was made to set aside the nonsuit, which was submitted to the court without argument.

*Per Curiam.* The proof that the witnesses to the written contract could not be found, was too loose to let in the secondary evidence of proof of their hand-writing. There is no case that has relaxed the rule to this length. The witnesses lived in the same county, and the party never attempted to *subpœna* them until the day before the court. All the proof that the party kept them out of the way is, that he endeavoured to deceive the person who called, by falsely telling him they had gone on a journey. This would have been a sufficient excuse for not bringing on the trial; and might, perhaps, have been ground for a rule of this court to help the party, if the same deception should be repeated. One of the witnesses did not live with his father, and appears to have been of age, and not under his control. The cases of *Cunliffe v. Lefton* (2 *East.* 183), and of *Crosby v. Percy* (1 *Taunt.* 364), are the strongest in favor of a relaxation of

Where the witnesses to a written contract were the sons of the defendant, who executed the contract, and the plaintiff, the day before the sitting of the circuit, inquired of the defendant for the witnesses, in order to sub-

[\* 122]  
[pœna them, and was falsely told by defendant that they were gone on a journey; this was held not to be a sufficient reason for admitting other testimony of the hand writing; the plaintiff not having used sufficient diligence to procure the witnesses. (a)]

(a) *Vid. Jackson v. Gager*, 5 *Cowen*, 333. *Jackson v. Cody*, 9 *Cowen*, 140.

NEW-YORK, the rule ; and they do not, by any means, reach this case. The party is bound to show that he has made fair and diligent inquiry, and cannot procure the \*witness. Here was not timely and sufficient diligence used.

WILLETT  
v.  
STARR.

[ \* 123 ]

The attempt to prove a parol contract like the one in writing, after failing to prove the latter, was contrary to the settled rules of law, and the motion to set aside the nonsuit must be denied.

Motion denied.

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WILLETT *against* STARR.

Where an attorney of this court was sued in November, 1809, for 25 dollars and 93 cents, and had a set-off of 20 dollars and 25 cents, and the plaintiff recovered 5 dollars and 68 cents, it was held, that the defendant was entitled to recover costs ; but that the plaintiff might set off the amount he had recovered against so much of the costs.

THIS was an action of *assumpsit*. The plaintiff's demand was for twenty-five dollars and ninety-three cents, and the defendant, who is an attorney of this court, had a set-off of twenty dollars and twenty-five cents, which was disputed by the plaintiff.

The bill was filed against the defendant in November term, 1809, and the cause was tried in *Rensselaer* county, when the jury found a verdict for the plaintiff for five dollars and sixty-eight cents.

The only questions submitted to the court were, whether either and which party was entitled to costs, and whether the damages recovered might not be set off against so much of the defendant's costs ?

*Per Curiam.* This suit ought to have been brought before a justice of the peace. The defendant is entitled to recover costs, but the amount of the plaintiff's recovery may be set off against so much of the defendant's costs. (See 6 *Johns.* Rep. 332. *Act*, 28th sess. c. 93, s. 6. (a))

(a) *Infra*, 357. *Porter v. Lane.* *Walsh v. Sackrider*, 7 *Johns. R.* 557. *Wood v. Gibson*, 1 *Cowen*, 597.

NEW-YORK,  
May, 1811.Stow  
v.  
WADLEY.\* *Stow against WADLEY.*

THIS was an action of *assumpsit*, on a promissory note, dated 17th *June*, 1808, by which the defendant promised to pay the plaintiff one hundred and eleven dollars and fifty-three cents, in one year from the date.

It appeared that the plaintiff, at the time the note was given, declared to the defendant, that there had been a mistake in the settlement of accounts between them, about four years before, of eighty-four dollars, in favor of the defendant. The defendant denied that there had been any mistake; but it was agreed between the parties, that the defendant should give a note to the plaintiff for the eighty-four dollars and interest, which should be lodged in the hands of *A. Ten Eyck*, with directions, that if the defendant should, within sixty days, exhibit to *Ten Eyck* evidence by which he should think the defendant ought not to pay the note, that then the note should be delivered to the defendant, otherwise it was to belong to the plaintiff. The defendant accordingly made the note, on which the action was brought, which was placed in the hands of *Ten Eyck*, with the agreement of the parties, and he gave notice to the defendant to produce the evidence. The defendant, within the sixty days, insisted on giving *parol* evidence, which *Ten Eyck* conceiving himself not authorised to admit, returned the papers to the plaintiff, without doing any thing further in the business.

At the trial of the cause, at the circuit in *Lewis* county, in *June*, 1810, the jury, under the direction of the judge, found a verdict for the plaintiff, for one hundred and twenty-eight dollars and fourteen cents.

\*A motion was made to set aside the verdict, and for a new trial, which was submitted to the court without argument.

*Per Curiam.* The case shows that there was no consideration for the note. *Ten Eyck* declined to act, and would not receive the *parol* evidence that the defendant offered. The defendant was not in default, and his *default*, or a decision of *Ten Eyck* against him, was a condition precedent to the validity and binding operation of the note. The verdict ought to be set aside, and a new trial awarded, with costs, to abide the event.

It was agreed between *A.* & *B.* that *B.* should give his promissory note to *A.* for a certain sum, which *A.* alleged was due to him, for a mistake made on a settlement of accounts between them a few years before, but which mistake was denied by *B.*, and that the note should be lodged in the hands of *C.*, and if *B.* within 60 days, should exhibit proof to *C.*, from which *C.* should think *B.* ought not to pay the note, then it should be delivered to *B.*, otherwise it should belong to *A.*; and *B.* insisted on producing *parol* proof to *C.*, which he refused to admit. In a suit against *B.* on the note,

[\* 125]  
it was held that the defendant was not in the default, and that his default, or the decision of *C.* against *B.* was a condition precedent to the validity and binding operation of the note. (a.)

(a) *Vid. Taylor v. Bullen*, 6 Cowen, 624.

NEW-YORK,  
May, 1811.

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VAN ANT-
WERP
v.
STEWART.

VAN ANTWERP *against* STEWART.

In an action of *debt* on an arbitration bond, the defendant pleaded *no award*; and the plaintiff replied that the defendant revoked the submission, &c. but did not state that the revocation was under seal; the replication was held bad. (a)

THIS was an action of *debt* on an arbitration bond. *Plea*, no award. Replication, that the arbitrators took upon themselves the burden of the award, and met together, and were willing to award, but the defendant delivered a countermand or revocation of the submission, in writing, under his hand, dated the 16th *September*, 1807. To this replication there was a general demurrer and joinder.

The objections were, that the replication did not state that the revocation of the submission was under seal; nor was it stated or averred that the arbitrators did not make an award. The demurrer was submitted to the court without argument.

[* 126]

Per Curiam. The replication is bad in not stating that the revocation of the bond of submission was under seal. A parol revocation would have been a nullity. There are no terms of art used in the replication, which import that the revocation was by deed, and the court *cannot intend it. (1 *Saund.* 291. *Cabell v. Vaughan*, note 1, and the authorities there cited.) The replication is also defective in not averring a breach of the bond, and that no award was made by reason of a revocation, or that an award was made, and that the defendant refused to abide by it.

Leave is, however, given to the plaintiff to amend according to his prayer, upon payment of the costs of the demurrer, and of the proceedings subsequent.

(a) *Vid. Allen v. Watson*, 16 Johns. R. 205. *Frets v. Frets*, 1 Cowen, 335.

RATTOON and another *against* OVERACKER, Executor of CRAIG.

To a declaration against *A.* as executor of *B.*, the defendant pleaded in abatement that *B.* died intestate, and letters of administration

THIS was an action of *assumpsit*. The declaration was on a promissory note made by *Moses Craig*, deceased, and for goods sold and delivered, and for the use and occupation of land.

The defendant pleaded in abatement of the declaration, because *Craig* died intestate, on the 21st *January*, 1809, and 94

after his death, to wit, on the 24th *November*, 1809, administration, &c. was granted to the defendant and his wife, without this, that the defendant is or ever was executor, &c. and that he is ready to verify, &c. wherefore he prays judgment of the said bill, and that the same may be quashed, &c.

The plaintiffs replied, that previous to granting the letters of administration, &c. the defendant became executor, &c. the defendant became executor, &c. of *his own wrong*, &c.; that is, the defendant, previous to the granting of administration, &c. took possession of and converted to his own use, the goods, chattels, and credits of the said *Moses Craig*, and sold part of them, and discharged debts, thereby making *himself executor, &c. of *his own wrong*; and this they are ready to verify, &c.

To this replication there was a special demurrer. The causes of demurrer were, that the replication was double; that it attempted to put at issue several and distinct matters; and was multifarious, &c.

Per Curiam. The plea is good, and the replication ill, because the taking out letters of administration legalised those acts which were tortious at the time. In *Vaughan v. Browne* (*Str. 1106* and *328*), the court of K. B. laid down this doctrine, that though a person who is sued, as executor *de son tort*, shall not defeat the suit, by taking out letters of administration pending the suit, because the suit was well commenced; yet that such an administration will legitimate all intermediate acts *ab initio*, and justify a retainer. This case is very fully reported in *And. 328*; and Lord *Kenyon*, in *Curtis v. Vernon* (*3 Term Rep. 587*), cites this decision as good law. It must, therefore, be considered as overruling the more ancient decisions, which declared, that though an executor *de son tort* did afterwards take out letters of administration, yet it was still in the election of the creditor to charge him as executor or administrator. The case in *Strange and Andrews* cannot be reconciled, upon principle, with the former doctrine; and as that case was three times argued, and very solemnly decided, upon demurrer, it ought to prevail. It is the more reasonable rule; for, as the court observed, "It would be very hard to lay it down, that if a man who sues for administration is opposed, and the cause runs out into any length, that the acting *pendente lite* should be construed such a wrongful executorship, as can never be purged so as to give

(a) But a person intermeddling with the estate of a decedent is liable, if he acts without authority, to be charged as executor *de son tort*, although he has taken out letters of administration in a neighboring state. *Campbell v. Tousey*, 7 Cowen, 64.

NEW-YORK,
May, 1811.
RATTOON
V.
OVERACKER.

tion were after-
wards granted
to the defend-
ant, &c.

The plaintiff
replied, that
previous to
granting the
letters of admin-
istration, the
defendant made
himself execu-
tive.

[* 127]

de son tort,
&c.

On demurrer,
the replication
was held to be
bad, and the
declaration was
quashed. Tak-
ing out letters
of administra-
tion made legal
all acts which
were before
tortious. If a
person who is
sued as execu-
tor *de son tort*,
takes out ad-
ministration
pending the
suit, though it
will not defeat
the suit, which
was well com-
menced, yet it
will legalize all
intermediate
acts *ab initio*,
and justify a
retainer. (a)

NEW-YORK, him the benefit of retaining." And if the letters of administration will purge the *tort*, so as to justify a retainer, there is no reason why it should not cure the act altogether, by a retrospective *effect. It does no possible injury to the creditor. The declaration must, therefore, be quashed.

[*128]

JACKSON, *ex dem.* ROSS, WILSON, and others, against COOLEY.

In an action of ejectment, the lessors of the plaintiff resided in *England*, and claimed to be heirs of the person who died seized of the land in question. A witness here deposed that he knew the ancestor, and had charge of the land as his agent, and corresponded with him, and after his death, with the lessor, who sent him a power to act for him, as heir and devisee, and that his information was also derived from persons acquainted with the family of the lessors; it

[*129] was held that this was sufficient evidence, *prima facie*, of pedigree or heirship, to go to the jury.

Hearsay evidence is sufficient to prove a pedigree. (a)

The acknowledgment of a deed from persons describing themselves as

THIS was an action of ejectment. The cause was tried at the *Essex* circuit, before Mr. Justice *Van Ness*, the 15th *January*, 1811.

The plaintiff produced in evidence a patent for 2,000 acres of land, in *Boquett*, from the king of *Great Britain*, dated 16th *April*, 1765, to *James Ross*, and an exemplification of a deed for the same land from *Ross* to *William Wilson* and *John Goodrich*, in fee, dated 10th *August*, 1765; recorded in the secretary's office. The deposition of *Cary Ludlow*, of the city of *New-York*, taken by consent of the parties, was also read in evidence. He testified, that about thirty years ago, he knew *William Wilson*, who then resided in *New-York*, and removed to *England*, prior to the year 1783, where he died, as the witness understood, between the year 1788 and 1795; that he was not married; that the witness never heard that he left any children, nor any brother or sister, nephew or niece, except his nephew *John Wilson*, one of the lessors, who claimed to be heir at law and devisee of *William Wilson*. The witness was the agent of *William Wilson*, in his life-time, and superintended his lands, particularly those in the patent to *Ross*, and corresponded with him; and after the decease of *William Wilson*, *John Wilson* sent a power of attorney, in which he *styles himself the heir at law and devisee of *William Wilson*, to the witness, which was dated the 16th *November*, 1798. The witness had corresponded with *John Wilson*, and had always understood from persons acquainted with the family, that he was the heir at law and devisee of his uncle *William Wilson*, who claimed one undivided moiety of the land patented to *Ross*, and *John Goodrich* the other moiety. The witness was the agent of *Goodrich*, in his life-time, and was, afterwards, empowered to act

(a) *Vid. Jackson v. Browner*, 18 *Johns. R.* 37. *Jackson v. King*, 5 *Cowen*, 237. *David v. Wood*, 1. *Wheat.* 6.

as agent of the children and *co-heiresses* of *Goodrich*, who are also lessors of the plaintiff. The information of the witness was derived from the several powers of attorney he had received, during a correspondence with the parties, and from conversations with *Goldsborough Banyar* and *Samuel Corp*, and others, acquainted with the families of *Wilson* and *Goodrich*, but he had never seen *Joseph Wilson*, or the children of *Goodrich*, all of whom resided in *England*.

A witness for the defendant testified, that five or six years before, a Mr. *Kempthorne* came to view the premises, who said, that he was the grandson of *John Goodrich*, and that there were sixteen or eighteen heirs of *Goodrich* who claimed half of the patent, and several sisters belonging to the family. There was also some evidence on the part of the defendant, relative to an adverse possession of the tenants, which it is unnecessary to state.

It appeared that Mr. *Ludlow* had paid the taxes in 1786 and 1787, and directed the tenants to pay the taxes on the land in their possession. The jury, under the direction of the judge, found a verdict for the plaintiff.

A motion was made to set aside the verdict, and for a new trial, which was submitted to the court, without argument.

THOMPSON, J. delivered the opinion of the court. The lessors of the plaintiff claim title to the premises in question, as heirs at law of *William Wilson* and *John Goodrich*, deceased. A regular title from the government having been shown in their ancestors, the only question upon the trial was, whether the evidence warranted the jury in finding that the lessors were the heirs of *Wilson* and *Goodrich*. No objection was made to the competency of the evidence. It was, therefore, a question altogether for the jury. *Cary Ludlow* testified that he was well acquainted with *William Wilson*, when he resided in *New-York*; that he removed from this country to *England* prior to the year 1783; that he was his agent here, and superintended his lands; that he died, as he has always understood, some time between the years 1788 and 1795; leaving no children, or brother or sister, and that *John Wilson* was his only nephew and heir at law; that after the death of *William Wilson*, he acted as the agent of *John Wilson*, in relation to the lands in question, by virtue of a power of attorney from him, bearing date the 18th of *November*, 1795, wherein he is styled the heir at law of *William Wilson*; that he has corresponded with *John Wilson*, and has always understood, from the acquaintances of the family, and the people who claimed an interest in these lands under the patent to *Ross*, that *John Wilson* was both devisee and

NEW-YORK,
May, 1811.

JACKSON
v.
COOLEY

heirs, taken according to the directions of the act, before the *mayor* of *London*, is also a circumstance of weight in evidence of pedigree. (a)

[*110]

(a) *Vid. Jackson v. King, ut supra. Jackson v. Russell*, 4 *Wendell*, 543.

NEW-YORK,
May, 1811.

JACKSON
V.
COOLEY.

[* 131]

heir at law to *William Wilson*, who claimed an undivided moiety of the lands granted to *Ross*, and that *John Goodrich* claimed the other moiety. The testimony of *Ludlow*, showing that the other lessors of the plaintiff were the heirs at law of *John Goodrich*, was substantially the same. In addition to which, a deed from them to *Ezra Coats*, another lessor, was produced, wherein they are described as such heirs. This deed was duly acknowledged before the mayor of *London*, agreeably to the statute of this state. Mr. *Ludlow* further stated, that his information was derived from the several powers of attorney he received and *correspondence with the parties, and conversations with *Goldsborough Ban-yar*, *Samuel Corp*, and other acquaintances of the families of *Wilson* and *Goodrich*.

This testimony was sufficient, *prima facie*, to be submitted to the jury. Had there been any evidence, on the part of the defendant, casting any doubt or suspicion on the subject, the sufficiency of the evidence might be somewhat questionable. Testimony, as to pedigree, is not to be tested by the ordinary rules of evidence. The subject necessarily requires a relaxation of those rules; and it is, of course, always treated as an excepted case. Hearsay evidence, or any thing which shows a general reputation, is admissible to establish a pedigree. (*Peak Evid.* 9.) The declarations of persons, who from their situation were likely to know, are competent evidence. Lord *Mansfield* (*Goodright v. Moss*, *Coup.* 591), says, tradition is sufficient in point of pedigree. *Circumstances* may be proved; such as an entry in a family bible; an inscription on a tombstone; a pedigree hung up in a family mansion; which are all good evidence. In this case, also, the *recitals in deeds*, the finding of a special verdict between other parties, stating a pedigree (*Buller*, 233), a bill in Chancery by an ancestor (7 *Term Rep.* 3, note), though not admissible in other cases, are competent to prove a family pedigree. The declarations of the members of a family, and of others living in habits of intimacy with them, are said, by Lord *Kenyon*, to be received as evidence of pedigree (*Term Rep.* 723); and he does not confine it to the declarations of *deceased* persons only. The acknowledgment of the deed to *Coats*, by the heirs of *Goodrich*, before the mayor of *London*, is a fact of some importance in proof of pedigree. Our statute requires that the officer taking the acknowledgment should know, or have satisfactory evidence, that the grantors are the persons described therein, and who executed the deed. The grantors being described as such heirs, their identity must have been known to the *mayor, or proof thereof given to him. And this, though *ex parte*, is entitled to as much, if not more weight, than many circumstances we find in the

[* 132]

books which have been received as evidence of pedigree. The books furnish us with no definite or precise rule on the subject. Almost any circumstances, which are calculated to show a general reputation, and afford reasonable grounds of belief, are received as evidence of pedigree; and I cannot say that the testimony given to the jury, in this case, was not sufficient to warrant the verdict, in finding that the lessors of the plaintiff were the heirs at law of *Wilson* and *Goodrich*, especially as it was in proof, that the defendant does not pretend to claim the title to the premises, or any thing more than the mere naked possession.

The opinion of the court, accordingly, is, that the motion for a new trial must be denied.

NEW-YORK,
May, 1811.

JACKSON
V.
COULTER

SPENCER, J. (*dissenting*). On the trial of this cause, a title to the premises in question was shown in *William Wilson* and *John Goodrich*, each a moiety, both of whom are dead; and it became necessary to prove that *John Wilson* was the heir at law of *William Wilson*, and that *Margaret Goodrich* and others were co-heiresses of *John Goodrich*.

The only proof of the pedigrees of those claiming to be the heirs of *William Wilson* and *John Goodrich*, was the deposition of *Cary Ludlow*. He states, that *William Wilson* died in *England*, as he has always understood, between the years 1788 and 1795, leaving *John Wilson*, his nephew, heir at law; that he (*Ludlow*) was the agent of *William Wilson* during his life, and superintended his lands, particularly those in question; that he corresponded with *William Wilson*, and after his decease *John Wilson* empowered him to act as his agent on the premises. The power is dated 18th November, 1795, and in it *John Wilson* is styled the heir at law and devisee of *William * Wilson*; that he had corresponded with *John Wilson*, and has always understood from all the acquaintances of the family, and the people who claimed an interest in said lands, under the patent to *Ross*, that *John Wilson* was both devisee and heir at law of *William Wilson*, since *John* succeeded to the estate; that he was the agent of *John Goodrich* in his life-time, and after his death he was empowered to act as the agent of the children and co-heiresses of *J. Goodrich*, who are the lessors of the plaintiff; that he never heard that *W. Wilson* left any children, or brother or sister, or any other nephew or niece than *John Wilson*; that this information was derived from the several powers of attorney he received, from correspondence with the parties, and conversations with *Goldsborough Banyar*, *Samuel Corp*, and other acquaintances of the families of *Wilson* and *Goodrich*; that he had always paid the taxes on the land he knew was

[* 133]

NEW-YORK,
May, 1811.

JACKSON
v.
Cooley.

improved. A deed from *Margaret Goodrich* and others to *Ezra Coats*, jun. dated 2d September, 1807, was then offered in evidence, and was objected to on the ground that the heirship of the grantors was not sufficiently proved, though it was admitted that *John Goodrich* was dead. The deed was admitted.

The defendant's counsel raised several other objections, all of which I consider so clearly untenable, as not to require an opinion on them; the only objection I shall examine, is this: whether the evidence of Mr. *Ludlow* made out, legally, the facts, that *John Wilson* was the heir of *William Wilson*, and that *Margaret Goodrich* and the other grantors in the deed to *Coats*, were the heirs of *John Goodrich*.

I had, at first, supposed that there was fuller proof in favor of *John Wilson's* claim to be heir of *William Wilson*, than with respect to those alleging themselves to be heirs of *John Goodrich*, but I am satisfied they stand on the same footing.

[* 134] As a general rule of law, all material facts are to be proved by persons having personal knowledge of the *facts to which they depose; for evidence signifies that which demonstrates the truth of the point in issue. There are several exceptions to the rule, growing out of the particular circumstances of the cases; and in questions of pedigree, prescriptive custom, or character, hearsay evidence will be admitted, for the reason that, in these instances, (and some others might be added), the facts to be proved are, in their very nature, not susceptible of positive proof; but whilst the general rule of law is relaxed to the necessity of particular cases, care should be taken not to go beyond that necessity, and admit the most vague hearsays.

The testimony of Mr. *Ludlow* goes to show, first, that he was the agent of *William Wilson* and *John Goodrich*, in their life-times; second, their deaths; third, powers of attorney from *John Wilson*, the supposed nephew of *William Wilson*; and from the children and co-heiresses of *John Goodrich*; fourth, that he paid taxes on the improved lands in behalf of his constituents; and fifth, information derived as well from the powers of attorney, and correspondence with the parties, as from conversation with Messrs. *Banyar* and *Corp*, and other acquaintances of the families of *Wilson* and *Goodrich*, that they are respectively heirs of *Wilson* and *Goodrich*.

To the two first facts there can be no objection. Mr. *Ludlow's* testimony was competent to prove them. The other facts do not establish, even *prima facie*, the fact of heirship.

The powers of attorney and correspondence, were acts done by the persons asserting themselves to be heirs; and upon no principle can such acts be evidence in their favor, to establish the facts they set up. A correspondence with a person

abroad may enable his correspondent here to testify to his handwriting ; and the writing thus proved may be used against the foreign correspondent ; but he cannot create evidence for himself. *The correspondence and powers of attorney might be evidence against the persons asserting themselves to be heirs ; but it would be overthrowing every rule of evidence to admit them as evidence for them, (5 *Term Rep.* 121). The circumstance that they live abroad cannot alter the effect of their acts. If a power of attorney and letters would be evidence of the heirship in this case, then such acts would equally be evidence, if the parties resided here.

NEW-YORK,
May, 1811.

JACKSON
v.
COOLEY.

[* 135]

The payment of taxes is thrown in as a make-weight. It cannot be considered as any evidence whatever of ownership. Taxes are frequently imposed without any designation of the owner ; and if payment of them was to be regarded as evidence of title, no man would be secure.

It comes then to this : is the information of Messrs. *Banyar* and *Corp*, and *other acquaintances* of the families, that kind of hearsay, in the case of pedigree, which the law requires ? I think it clearly is not.

It is not shown in the case, where Messrs. *Banyar* and *Corp*, and the other acquaintances of the families, reside, or whether they are living or dead. If they reside within the jurisdiction of the court, then it follows, that instead of our having their knowledge of the families, we have the intelligence at second hand. *Peake*, (in his *Treaties on Evidence*, page 11), after speaking of hearsay evidence, in cases of pedigree, prescription, and custom, says, "In these cases, therefore, the law departs from its general rule, and receives evidence of the declarations of deceased persons, who from their situation were likely to know the facts, and also the general reputation of the place, or family most interested to preserve in memory the circumstances attending it ; any thing which shows such reputation is, on a question of this sort, received in evidence, though oftentimes wholly inadmissible in other cases." Again, (p. 12), "So to prove the state of a family, as who a man married, what children he had, that *A.* died abroad, &c. declarations of *deceased persons, who from their situation were likely to know, and the general belief of the family, are sufficient." And, (p. 13), he illustrates the distinction between hearsay evidence of mere facts, and of general reputation, between the proof in cases of pedigree, and cases of custom and prescription. (1 *Bull. N. P.* 294, 295.)

[* 136]

Had Mr. *Ludlow* been acquainted in the families of *Wilson* and *Goodrich*, and from that been likely to know the relation which these persons bore to *Wilson* and *Goodrich*, his testimony would have been competent ; but it is derived from others, none of whom appear to be dead, and all of whom, for aught that

NEW-YORK,
May, 1811.

JACKSON
v.
GIVEN
and others.

appears, may be amenable to our process. Such testimony never was admitted to be sufficient; and though to admit it in this case might probably relieve the party from expense and trouble, and promote justice, I confess I am unwilling to break in upon the established rules of evidence, and put every thing afloat.

It appears to me, therefore, that there ought to be a new trial, with costs to abide the event of the suit.

Motion denied.

[* 137] *JACKSON, *ex. dem.* HUMPHREY and others, *against* GIVEN and others.

In 1790 a patent was granted for a military lot to *A.*, who had been a soldier in the army of the *United States*; and who, in Feb. 1795, sold and conveyed it to *B. C.*, in 1793, purchased the same lot of a person, pretending to be the original patentee, and fraudulently executed a deed for the lot to *C.*, who afterwards con-

veyed it to *D.*, who sold it to various persons, who took possession under him. In Aug. 1804, *A.*, the real patentee, executed another deed for the same lot to *W.*, which was first recorded; and in 1806 *D.* purchased the title of *W.*, and took a deed from him, which was also recorded.

In an action of ejectment brought by *B.* against the persons in possession under *D.* it was held that when *W.* purchased of *A.*, in 1804, the land was held adversely under a void title; but as *D.* afterwards conveyed it to *D.*, who sold it to various persons, who took possession under him. In Aug. 1804, *A.*, the real patentee, executed another deed for the same lot to *W.*, which was first recorded; and in 1806 *D.* purchased the title of *W.*, and took a deed from him, which was also recorded.

In an action of ejectment brought by *B.* against the persons in possession under *D.* it was held, that when *W.* purchased of *A.*, in 1804, the land was held adversely under a void title; but as *D.* afterwards purchased the title of *W.*, derived from the real patentee, for the benefit of those in possession, *B.* could not set up that *adverse* possession, to defeat the purchase by *W.*; and that the persons holding under *D.* had a right to protect themselves by the title of *W.* equally as if they had purchased it of *W.* (a)

The deed from the patentee to *W.*, being first recorded, was entitled to a preference, under the statute, there being no satisfactory proof of an actual or implied notice to *W.* of the prior deed to *B.*

To defeat the prior registry of the second deed, there must be fraud or undoubted notice.

If one affected with notice, conveys to another without notice, the latter is as much protected, as if no notice had ever existed. (b)

(a) A person in possession of land claiming title, may always purchase in an outstanding title to protect that possession. *Jackson v. Smith*, 13 Johns. R. 466. *Jackson v. Harrington*, 9 Cowen, 86; and a defendant in possession without claim or color of title, may, it seems, destroy a plaintiff's right to recover by shewing title out of the lessor of the plaintiff. *Schaefer v. Jackson*, 2 Wendell, 14, (reversing the judgment in 7 Cowen, 187.) *Jackson v. Rowland*, 6 Wendell, 600. *Lore v. Simms*. See 9 Wheat. 515.

(b) The following are the principal cases on the subject of notice. *Jackson v. Sharp*, 9 Johns. R. 163. *Jackson v. Burgott*, 10 Johns. R. 457. *Jackson v. Elston*, 12 Johns. R. 422. *James v. Morley*, 2 Cowen, 946. *Jackson v. Winslow*, 9 Cowen, 13. *Jackson v. Page*, 4 Wendell, 585. *Tuttle v. Jackson*, 6 Wendell, 213.

Alexander Humphrey to *Timothy Benedict*; and *Frederick Knox*, a witness, testified, that he saw the deed executed by the grantor, who called himself *Alexander Humphrey*, at *Fairfield*, in the state of *Connecticut*, and who said he had been a serjeant in the army. He appeared to be about 45 years of age, and said he was a native of *Fairfield*; but the witness never saw him before nor since that time.

*A deed was produced from *Timothy Benedict* to *Josiah Masters*, dated 16th *July*, 1793, for the lot in question.

A witness for the plaintiff testified, that he knew *Alexander Umphrey* more than forty years ago; he resided in *Wallkill*, in *Ulster* county, and enlisted in the army during the last war, and the witness heard that he was a serjeant. After the war, he returned to *Wallkill*, where he resided about a year, and then removed into *Washington* county, from whence he went to *Canada*. The witness knew him well, and that he always wrote his name *Alexander Umphrey*, not *Humphrey*, and the witness had seen him frequently sign his name in that manner.

The defendant then produced a deed from *Alexander Umphrey* to *Judah Williams*, dated *August 31*, 1804, which was recorded 7th *April*, 1806; and a deed from *Judah Williams*, dated 9th *April*, 1806, to *Josiah Masters*, which was duly recorded.

It was proved that *Scofield*, one of the defendants, about 7 years since, purchased 200 acres, part of the lot of *John Atkinson*, and took possession; and two other of the defendants occupied parcels under *Scofield*, and two other of the defendants purchased of *Atkinson* one hundred acres of the same lot, of which they took possession. *Atkinson* claimed title to the whole lot, by virtue of a deed from *Josiah Masters*, executed prior to the 31st *August*, 1804, and *Scofield*, *Ingersoll* and *Smith*, were in possession prior to that time. *Judah Williams*, afterwards, brought actions of ejectment against them, and, pending the suits, *Masters* purchased the title of *Williams*, and the suits were discontinued.

It appeared that *Alexander Umphrey* died at *Augusta*, in *Upper Canada*, the 18th *May*, 1806. And it was proved that he had said, that he was in the army of the *United States*, in the *New-York* line, and had drawn his bounty lands. A witness also testified that the deed of *the 5th of *February*, 1793, from him to his brother *Samuel Umphrey*, was executed at *Augusta*.

A witness also testified that he knew *Judah Williams*, and saw him at *Augusta*, in *August*, 1804. *Williams* said to him, "that *Alexander Umphrey* had drawn a valuable lot of land in *New-York*, which he should be glad to purchase, but he had understood that *Umphrey* had fooled it away, and

NEW-YORK,
May, 1811.

JACKSON
v.
GIVEN
and others.

[* 138]

[* 139]

NEW-YORK,
May, 1811.

JACKSON
v.
GIVEN
and others

had sold it several times, and did not consider it worth his trouble to look about it."

The jury, under the direction of the judge, found a verdict for the defendants.

A motion was made on the part of the plaintiff, to set aside the verdict, and for a new trial.

Rodman and Shepherd, for the plaintiff.

E. Williams, contra.

KENT, Ch. J. delivered the opinion of the court. 1. When *Williams* purchased of the patentee, in *August*, 1804, *Atkinson*, and those in possession under him, held the lot adversely, under a false title derived from a fraudulent source, and not from the real patentee. But as *Williams*'s title was afterwards purchased in, by *Masters*, for the benefit of *Atkinson*, and those in possession under him, the lessors of the plaintiff cannot set up, against those very tenants, that adverse possession to defeat the purchase by *Williams*. The defendants have a right to protect themselves under that title, equally as if they had themselves purchased it, in the first instance. Why not? The party in possession may always purchase in an outstanding title; and *Atkinson* and those under him have a right, by the purchase under *Williams*, to connect themselves with the patentee. The prohibition from purchasing pretended titles was intended for the benefit of the party at the time in possession; and it ought *not to be used as a weapon against such party. This would be defeating the very object and policy of the rule. In the case of *Keite v. Clopton*, (*Carter*, 18), Sir *O. Bridgeman*, Ch. J. said, "that an act may be void in several degrees; 1. Void, so as if never done, to all purposes, so as all persons may take advantage thereof; 2. Void to some purposes only; 3. So void by operation of law, that he that will have the benefit of it, may make it good." *Quisquis potest renunciare jure pro se introducto*. The statute allows the party in possession to buy any pretended title; and there is no reason that the rule making the purchase of a pretended title void, should be applied to a purchase set up by the very party in possession at the time. The title so set up cannot be to the prejudice of any person. It is not within the mischief of maintenance.

The deed from the patentee to *Williams* being first recorded, is entitled, by the statute, to a preference. Nothing can defeat this preference, but the fact that *Williams*, when he made the purchase, had notice of the prior conveyance from the patentee of the 5th of *February*, 1795. There is no pretence that he had any express knowledge of that specific convey-

ance; and the only ground from which we can deduce any implied or constructive notice of it, arises from the conversation which *Williams* had with a third person about the time of the purchase, in which he said that "he had understood that *Umphrey* had fooled away the lot, and had sold it several times, and did not consider it worth his trouble to look about it." Even, if we were to admit that *implied* notice will supply the absence of the registry of the prior conveyance, this conversation, unaccompanied with other circumstances, is too loose to justify the inference of such notice. The purchaser under the prior deed was not in possession, and never had been. That deed had been executed nine years before, and had been suffered to remain dormant, not only without being recorded, but *without any transfer of possession, or any act of ownership on the part of the purchaser. If the vague reports which *Williams* might have heard, be applied to this particular prior deed, he might well have presumed that it was not *bona fide*, or had been cancelled; and it would be rigorous to deprive him of his regular legal title under the statute, by the imputation of a fraud so imperfectly supported. In the case of *Hine v. Dodd*, (2 *Aik.* 275,) Lord *Hardwicke* said, that mere suspicion of notice was not enough to break in upon the registry act; and that nothing short of fraud, or clear and undoubted notice, would do. This decision was cited with much approbation by the master of the rolls, in *Jolland v. Stainbridge*. (3 *Vesey*, 478.) But if *Williams* did purchase with notice, the subsequent purchase by *Masters* from him is not to be affected by the fraud of *Williams*. It is a settled rule, that if one affected with notice, conveys to one without notice, the latter shall be protected equally as if no notice had ever existed. (2 *Vern.* 384. 2 *Fonb.* 153. *Amb.* 313. 1 *Johns. Rep.* 573, 574.)

The motion, on the part of the plaintiff, ought, therefore, to be denied.

Motion denied.

NEW YORK,
May, 1811.
JACKSON
v.
GIVEN
and others.

[* 141.]

NEW-YORK,
May, 1811.

JACKSON
v.
HARRIS.

JACKSON *ex dem.* HARRIS, against MARGARET HARRIS.

A., by his last

will, devised as

[* 142]

follows: "As

touching such

worldly estate

wherewith it

hath pleased

God to bless

me, I give, de-

vice, and dis-

pose of the

same, in the

following man-

ner and form:

First, I give to

Jeremiah, my

eldest son, 40

pounds, to be

levied out of

my estate; to

my son *Jacob*

40 pounds, &c.;

to my daughter

E. 5 dollars,

&c.; to my

youngest son

James, I give

and bequeath a

certain lot, &c.

Also, to my

beloved son

Henry, I give

and bequeath

all this certain

lot of land

which I now

possess, with

the farming

utensils," &c.

and added,

"all these lega-

cies before

mentioned, to

be paid on the

first of *May*,

1805, and to be

raised and levi-

ed out of my

estate," and

[* 143]

then appointed

his son *Henry*

and another

person his ex-

ecutors. It

was held, that

Henry took an

estate for *life*

only it being contingent whether the devisee would be chargeable with the payment of the legacies. (a)

(a) Vide *Jackson v. Bull*, 10 Johns. Rep. 148. *Jackson v. Martin*, 18 Johns. Rep. 31. *Wright v. Denn*, 10 Wheaton's Rep. 204.

more than an estate for life. The words "I give to my beloved son *Henry* all that certain lot," &c. are not of themselves sufficient to pass an estate *in fee*. Then, do the introductory words give them a greater extent? But the introductory words must be connected with the devising clause, to aid or explain it. (*Denn. v. Garkin, Cwsp.* 657.) But even if the prefatory words are connected with the subsequent clause, they will have no effect, unless there be some ambiguity in the devise. It has been repeatedly decided, that the introductory words themselves are not sufficient to carry a fee. (*Cwsp.* 352. 5 *Term Rep.* 13, 292, 558. 6 *Term Rep.* 175, 610. 3 *Atk.* 486, note. The case of *Frogmorton v. Wright*, (3 *Wils.* 414), is perfectly analogous; and Lord Chief Justice *De Grey* said, that words such as are used in this will, were never determined to carry a fee; that the words are merely descriptive of the locality, not of the quantity of the estate.

It may, perhaps, be said, that the legacies were chargeable on the real estate devised. But there are no words in the will which make them a charge on the real estate. Even if the real estate was intended, yet the devisee will not take a fee, unless the real estate devised be specifically charged. (6 *Co. 16. 2 Atk.* 341. 8 *Term Rep.* 497).

It will be objected, that the parol evidence to show that the personal estate was sufficient to pay all the debts and legacies, was inadmissible. In *Doe v. Bucknel*, (6 *Term Rep.* 610), it seems to have been regarded as admissible, and Lord *Kenyon* considered it as perfectly satisfactory, though not the ground of the decision in that case; and such appears to have been the opinion in the case of *Moore v. Price*. (3 *Keb.* 49.)

**Henry* and *Van Vechten*, contra. The testator sets out, in the usual words, denoting an intention to pass all his estate, real as well as personal. He then gives several legacies, chargeable on his estate, and then other legacies, and fixes a time for their payment, and declares that they are to be raised out of his estate.

NEW-YORK,
May, 1811.

JACKSON
v.
HARRIS

[* 144]

Parol evidence to show that the *personal* estate only was intended to be charged with the debts and legacies, is clearly inadmissible. In *Ulrich v. Litchfield*, (2 *Atk.* 372), Lord *Hardwicke* said, that there were only two cases in which parol evidence could be admitted in the construction of a will; first, to ascertain the person, where there are two of the same name; and second, to rebut a resulting trust. These are cases of a latent ambiguity. But there is no such ambiguity here. A man's whole estate, comprehends the real as well as personal; and any parol evidence to confine

NEW-YORK,
May, 1811.

JACKSON
v.
HARRIS.

the meaning to personal estate would contradict the will. Admitting that there was personal estate sufficient to pay all the debts and legacies, it does not follow that it was the intention of the testator, that the personal estate should be exclusively applied to that purpose.

Then, we contend, that the devise to *Henry Harris* passed a fee by necessary implication, the legacies being in gross, payable on a certain day, out of the whole estate, and not out of the profits. Though the introductory words cannot control the devise, yet they may be received, in explanation of the intention. (*Cases temp. Talb.* 157). Appointing the devisee executor, shows an intention that the land should be sold for the payment of the legacies. The words "all these legacies are to be raised and levied out of my estate," are as strong as a devise of lands to pay debts. (3 *Burr.* 1623. 3 *Wils.* 143). This point was expressly decided in *Jackson*, ex dem. *Decker and others, v. Merrell*, (6 *Johns. Rep.* 185), in this court. The charge is on the whole estate, which includes real as well as personal. The court cannot confine it exclusively to the *personal estate. (5 *East*, 87, 97). It is enough if the devisee might, by possibility, be injured, if the estate was not construed to be a fee.

[* 145]

SPENCER, J. delivered the opinion of the court. The lessors of the plaintiff are the heirs at law of *Ebenezer Harris*, and claim as such. The defence set up is, that *E. Harris* devised the premises in question to *Henry Harris*, and that he devised them to the defendant.

The question, then, between the parties, turns on the will of *E. Harris*, and whether under it, *Henry Harris* took an estate for life, or an estate in fee-simple. It has been contended, on the part of the defendant, that *Henry* took a fee under the will, 1st, in consequence of the charge on the real estate devised; and 2d, by the words in the introductory part of his will, by which he evinces an intention to make an entire disposition of his estate.

It appears to be well settled, that the declaration of an intention to dispose of an estate, "in manner and form following," or such like words, will not carry a fee. The declared intention has, sometimes, been called in aid to ascertain the quantity and extent of the devise, but has never been adjudged sufficient to determine the quantity of interest which the devisee took. (*Cowp.* 660. 3 *Burr.* 1618. 3 *Wils.* 141, and 414. 11 *East*, 220).

The will gives the premises by these words: "also to my beloved son *Henry Harris*, I give and bequeath all this certain lot of land, which I now possess, and is known by No. 136, together with all my farming utensils, and likewise the

stock belonging to my estate ;" then, after some specific legacies, are these words, "all these several legacies before mentioned, is to be paid the first of *May*, 1805, *all of which is to be raised and levied out of my estate.*" The residuum of the testator's *personal property is not disposed of, and he makes *Henry Harris* and another person his executors.

Some stress was placed on the word "all," in the devise of the premises to *Henry*. To show that such a word is to be taken as descriptive of locality and not of interest, the cases of *Bailis v. Gale*, (2 *Ves. jun.* 48. 4 *Cruise's Dig.* 249), and *Right v. Sidebotham*, (*Doug.* 759), are in point.

In deciding this case, we do not think it necessary to examine and pronounce on the difference between the effect of a charge on the person of the devisee, in consequence of the devise, and a charge on the estate devised; there is some subtlety in the distinctions on this subject. But we are of opinion that *Henry Harris* took only a life estate in the lands devised, on the principle, that it was contingent whether the devisee ever would be chargeable with the payment of the legacies; and that to carry a fee by implication, it is necessary that the charge should be absolute and certain.

The charge here is on the testator's *estate* generally; and it imports his property, his estate, as well personal as real. If the personalty was sufficient to pay the legacies, that fund must be first resorted to; for it is the natural and legal fund for the payment of debts and legacies. The leading case which decides that a contingent charge on a real estate will not carry a fee, is that of *Merson v. Blackmore*, (2 *Atk.* 341). The master of the rolls, in giving his opinion, said, "where a gross sum is to be paid out of the lands, to be sure, it gives a fee to the devisee of those lands. But here, the debts are not, at all events, charged on the real estate, but only contingently, if the personal estate should be deficient, and therefore does not come up to the cases cited, of a gross sum to be paid out of land, and consequently gives no more than an estate for life." The very point arose in *Doe v. Allen*, (8 *Term Rep.* 497). The decision of the master of the rolls in *Merson v. Blackmore* was cited *and sanctioned by the court. The case of *Doe v. Snelling* (5 *East*, 87), does not overrule the cases last cited, but proceeds on a different principle.

We give no opinion as to the admissibility of the parol proof, going to show that the executors took a personal estate more than sufficient to pay off all the debts and legacies, as it is not necessary to the decision of the cause.

The plaintiff must have judgment.

NEW-YORK,
May, 1811.

JACKSON
v.
HARRIS.

[* 146]

[* 147]

NEW-YORK,
May, 1811.

M'CULLUM
v.
GOURLAY.

M'CULLUM against GOURLAY.

Where a *bet* or *wager* is lost, and the money or property has been fairly paid or delivered, the court will not help the plaintiff.

Where *A.* delivered to *B.* two firkins of butter, and agreed that if *P.* was elected governor of the state, *B.* should pay a certain price for the butter, otherwise, he was to pay nothing; and *P.* was not elected, it was held that *A.* had no right of action against *B.* for the butter. (a)

[* 148]

IN error, on *certiorari*, from a justice's court. The plaintiff brought his action against the defendant before the justice, to recover the price of two firkins of butter, delivered to the defendant, and for which he gave a receipt to the plaintiff "to account with him for the same; that is, if *Jonas Platt*, Esq. is elected governor of the state, the defendant is to pay twenty-nine cents per pound for the butter, and if not, he is to pay nothing." The justice gave judgment for the defendant.

P. Van Vechten, for the plaintiff in error.

Rodman, contra.

Per Curiam. The butter was delivered, in the first instance, to the defendant, the winner, and the *payment* was to depend on the event of the election of governor. The plaintiff lost the bet, and, by the terms of sale, he was not, in that event, to be paid any thing for the butter. This case does not appear to come within that of *Bunn v. Riker* (4 Johns. Rep. 426). The plaintiff has now no right of action; for *potior est condito defendantis*. The courts will not help the plaintiff to obtain relief from a *bet*, when the money or property has been fairly paid or delivered. (1 East, 98. 8 Term Rep. 75. 2 *Comyn on Contracts*, 120).

The judgment must be affirmed.

(a) *Vide Mount v. Waite*, 7 Johns. Rep. 434, note (a).

NEW-YORK,
May, 1811.HOLLY
v.
RATHBONE.

HOLLY against RATHBONE.

IN error, on *certiorari*, from a justice's court. *Rathbone* sued *Holly* before a justice, and in his declaration stated, that *Holly* was one of the overseers of the poor of *Camden*, and, as such, has received certain moneys of *Elizabeth Potter*, a *pauper* of that town, and expected to receive more moneys which belonged to the *pauper*, and that in consideration thereof, he promised to pay to the plaintiff a certain debt due from *Elizabeth Potter* to the plaintiff; and that *Holly* did, in fact, receive moneys of the *pauper* sufficient in amount to pay the debt of the plaintiff.

The defendant pleaded *non assumpsit*, and the statute of frauds.

It was proved that *Holly*, as overseer of the poor, had the management of the property of the *pauper*, and had received money belonging to her; and on that account made the promise to the plaintiff, and had paid him seventy cents in part of the debt, and engaged to pay the residue, being four dollars. The justice gave judgment for the plaintiff below.

Clark, for the plaintiff in error, cited 1 *Term Rep.* 72. 2 *Vesey*, 341. 6 *Bro. P. C.* 45. *Ambler*, 586. *Roberts on Frauds*, 138. 140.

H. Bleecker, contra, cited 1 *Comyn on Contracts*, 26. *Bull. N. P.* 129. 2 *East*, 507. *Cowper*, 284. 289.

**Per Curiam*. As it appeared from the proof that *Holly* was not only the overseer of the poor, but that he actually had the management and control of the property of the *pauper*, and as a trustee, with the fund in hand, made a promise, the case comes within the doctrine in *Beecker v. Beecker*. (7 *Johns. Rep.* 99.)

The promise is to be taken to have been an express promise in writing, as the plaintiff in error has not called for any fact from the justice, to rebut that presumption. This was said, in *Beecker v. Beecker*, to be the acknowledged rule. The promise was one which *Holly* ought, in duty, as trustee, to have performed; and it was founded on a valuable consideration. The judgment ought to be affirmed.

A. an overseer of the poor, had the management and control of the property of *B.* a *pauper*, and received moneys belonging to her, in consideration of which he promised *C.* to pay him a debt due to him from *B.* This was held a valid undertaking, it being an express promise in writing, and founded on a valuable consideration. (a)

On a return to a *certiorari*, the promise on which the suit below was brought, was presumed to be an express promise in writing, when no fact appeared to the contrary.

[*149]

(a) *Vid. King v. Butler*, 15 *Johns. Rep.* 281. *Olcay v. Wickes*, 16 *Johns. Rep.* 129.

NEW-YORK,
May, 1811.

ANGEL
v.
FELTON.

ANGEL against FELTON.

Where a note is given to settle an account, the plaintiff cannot give in evidence the account, nor can he give parol evidence of the contents of the note, unless he clearly shows that the note has been lost or destroyed. (a)

The husband cannot be sued alone for the debt of his wife, contracted before their marriage.

[* 150]

IN error, on *certiorari*, from a justice's court. The plaintiff below brought an action against the defendant below, before the justice, and demanded six dollars and seven cents, on account. It appeared that *Betsey Thorpe*, having given a note to the plaintiff for six dollars and seven cents, afterwards married the defendant, and that the present suit was brought for the same debt. The note was not offered in evidence, nor was any reason assigned for its not being produced, except the hearsay report of witnesses, that the note had been destroyed. Some evidence was also given of the note having been altered; but it was vague and inconclusive. The jury found a verdict for the plaintiff for six dollars and seven cents, on which judgment was rendered.

Per Curiam. The demand was founded on a note given by the wife of the defendant, when *sole*. The note was not produced, and there was some mention made of an alteration of it; but no account was given why it was not produced. There were some loose reports of its having been destroyed. These reports were not sufficient evidence of that fact, so as to warrant parol evidence of its contents; and if any inference was to be drawn from them, it was that the note had been voluntarily discharged by the plaintiff. The plaintiff was not entitled to give the account in evidence for which the note had been taken; (See 1 *Johns. Rep.* 34, 37); nor was the defendant liable to be sued alone without his wife. This was so decided, on a motion in arrest of judgment, in the case of *Hutchinson v. Hewson*. (7 *Term Rep.* 348).

The judgment below must be reversed.

(a) *Vide Cumming v. Hackley, infra*, 202. *Cary v. Campbell*, 10 *Johns. Rep.* 363. *Smith v. Lockwood*, *id.* 300. *Raymond v. Merchant*, 3 *Cowen's Rep.* 147. *Hughes v Wheeler*, 8 *Cowen's Rep.* 77.

NEW-YORK,
May, 1811.CHESTNEY
v.
COON.CHESTNEY *against* COON.

IN error, on *certiorari*, from a justice's court. *Coon* sued *Chestney* before the justice, in debt for five dollars, for exacting toll, as a toll-gatherer, at the toll-gate, on the first great western turnpike, when the plaintiff was going to and returning from a grist mill, for the purpose of having his grain ground.

It appeared that *Chestney*, though told that the plaintiff was going to *Watson's* grist mill with grain to be ground, exacted the toll, and after the grain was ground, the defendant obliged the plaintiff to pay toll; though informed by the plaintiff, and the miller, that the plaintiff had gone to the mill for no other purpose. It appeared that the plaintiff resided in *Carlisle*, and *Watson's* grist mill is in *Schoharie*, on or near the turnpike, and that the plaintiff and his neighbors generally went to *Watson's* mill, when there was no grinding at the mill in *Carlisle*.

The act (22d sess. c. 30, s. 11. 11 R. S. 584, sec. 36), provides, that no toll shall be received "from any person passing to or from *public worship, or to or from his common business on his farm, or to or from any mill;" and the act passed 11th April, 1808, (31st sess. c. 213, 1 R. S. *ut sup.*), explanatory of the former act, says, persons shall be exempt from toll, "going to or returning from any grist mill to which such person *usually* resorts, for the sole purpose of grinding for the use of his family, or of those who may employ him, and no other."

The justice gave judgment for the plaintiff below.

Per Curiam. The evidence was sufficient to support the judgment. The plaintiff below went, as it appears, to *Watson's* grist mill to get his grain ground, and for no other purpose, and he generally went there when he could not have it ground in his own town. The judgment must be affirmed.

Judgment affirmed.

(a) *Vide Stratton v. Herrick.* *Stratton v. Hubbel*, 9 Johns. Rep. 356, 357. *Hearsay v. Prusn.* *Hearsay v. Boyd*, 7 Johns. Rep. 179. 183. *Bates v. Sutherland*, 15 Johns. Rep. 510.

Under the act, 22d sess. c. 30, s. 11, and the act, 31st sess. c. 213, a person is exempt from paying toll, on the first great western turnpike, when going to mill in a town different from that in which he resides, if it appears that he usually went to such mill, when there was no grinding in his own town, and that he went for no other purpose than to have his corn ground. (a)

[* 151]

NEW-YORK,
May, 1811.

BRADISH
v.
SCHENCK.

BRADISH *against* SCHENCK.

Letting land upon shares, for a single crop, does not amount to a lease of the land, and the owner alone can bring trespass. If one of two tenants in common brings an action of trespass, the omission to join the other can

IN error, on *certiorari*, from a justice's court. *Schenck* brought an action of trespass against *Bradish*, before the justice, for damage done by the hogs of the defendant, by breaking into the enclosure of the plaintiff, and destroying his corn, &c. And the plaintiff produced the certificate of the fence-viewers, appraising the damage, pursuant to the act, (24th sess. c. 78, s. 16, 2 R. S. 517, sec. 2, 3), at seven dollars. The defendant pleaded, that the plaintiff had distrained the hogs, and impounded them before the commencement of the suit; and that the plaintiff was not in possession of the land on which the trespass was alleged to have been committed.

[* 152] *It was proved that one *Curtiss* took the land of the plaintiff, and planted it with corn, upon shares. The hogs of the defendant were twice driven out of the field, and were afterwards impounded by the plaintiff, and about five days thereafter replied. The action of replevin, grounded on the original distress *damage-feasant*, was withdrawn soon after it was commenced; but it did not appear why it was withdrawn, or whether it was settled before the commencement of the action of trespass. The jury found a verdict for the plaintiff, on which the justice gave judgment.

Per Curiam. Letting land upon shares, if for a single crop, is no lease of the land, and the owner alone must bring trespass for breaking the close. (*Cro. Eliz.* 143). *Schenck* and *Curtiss* were tenants in common of the corn; but the omission to join *Curtiss* was only to be taken advantage of by pleading it in abatement. (1 *Saund.* 291, G).

We ought to intend that the action of replevin was at an end when this suit was brought, if we can take notice of it all. It was not pleaded, and the only proof of its existence was by *parol*.

The judgment must be affirmed.

(a) *Brotherton v. Hodges*, 6 *Johns. Rep.* 108

NEW-YORK,
May, 1811.TUTTLE
v.
BEBEE.TUTTLE *against* BEBEE.

THIS was an action of *assumpsit*. The cause was tried at the *New-York* sittings, in *December*, 1809, before Mr. Justice *Yates*.

The plaintiff's declaration, which was of *August* term, 1808, contained three counts:

1. On a written agreement dated *January* 1st, 1798, by which, in consideration that the plaintiff had delivered to him a certain quantity of goods, of the value of *about 2,600 dollars, as collateral security for a promissory note of the plaintiff, held by the defendant, for 1,420 dollars, payable the 1st of *May*, 1798. The defendant promised, in case the note was punctually paid, to deliver up the goods to the plaintiff but if the note was not paid, the defendant should sell the goods at auction, and pay over the surplus, if any should remain, after discharging the note, and deducting commissions and charges, to the plaintiff. The defendant pleaded *non assumpsit*, with notice of a set-off. The agreement or receipt for the goods was produced in evidence.

In an action of *assumpsit*, brought by *A.* against *B.* the defendant may set off a *bond* given by *A.* to *C.* and *assigned* by *C.* to *B.* before the commencement of the suit. (a)

[* 153]

A demand of the goods in *October*, 1804, was proved, when the defendant admitted that he had sold the goods, and that there was a balance in favor of the plaintiff, which, he said, he had paid to certain creditors of the plaintiff. The defendant, though requested, never rendered to the plaintiff any account of the sale of the goods.

The defendant offered, pursuant to the notice subjoined to his plea, to set off two bonds executed by the plaintiff, dated the 1st of *June*, 1801, one for 1,824 dollars and fifty cents, and the other for 1,007 dollars and twenty-nine cents, given to certain persons, in *Philadelphia*, and, by endorsement thereon, assigned to the defendant, on the 1st of *January*, 1808, which was prior to the commencement of this suit.

The plaintiff's counsel objected to the admission of this set-off, and it was rejected by the judge.

The defendant did not offer to produce any account of sales of the goods; and the judge charged the jury to take the invoice value, mentioned in the defendant's receipt, and after deducting the amount of the note, with 5 *per cent.* commissions and charges, and allowing a reasonable time for the sale of the goods, to find a verdict for the plaintiff, with interest. The jury found a verdict for the plaintiff for 1,850 dollars.

*A motion was made to set aside the verdict, and for a new trial. The material question was, whether the defendant

[* 154]

(a) The right of an assignee of a *chess in action* will be recognised and protected in a court of law. *Raymond v. Squire*, 11 *Johns. Rep.* 47. *Anderson v. Van Alen*, 13 *Johns. Rep.* 343. *Briggs v. Dorr*, 19 *Johns. Rep.* 95. *Wheeler v. Wheeler*, 9 *Cowen's Rep.* 34. *Welch v. Mandeville*, 1 *Wheat. Rep.* 233.

NEW-YORK, May, 1811. ought not to have been allowed to set off the bonds, which had been assigned to him.

TUTTLE
v.
BEEBE.

Woodworth, for the defendant, cited 3 *Johns. Rep.* 425. 4 *Term Rep.* 350, the opinion of *Buller*, J. 1 *Hen. Bl.* 659; and relied on the case of *Bottomly v. Brook*, stated by *Lawrence*, J. *arguendo*, in the case of *Winch v. Keely*, (1 *Term Rep.* 621), as in point. *Montague on Set-Off*, 11, 27.

Johnson, contra, admitted that courts of law had, of late years, gone very far in taking notice of assignees, and permitting assignments of *chooses in action*; but he contended, that to admit the *set-off* in this case would be going further than this court had ever gone, and further than the decisions of the *English* courts. It would entirely overturn the maxim of the common law, in regard to the assignment of *chooses in action*, and abolish all distinction between a court of equity and a court of law, in regard to equities or trusts of this kind.

[*155]

THOMPSON, J. delivered the opinion of the court. The principal question in this case is, whether the defendant ought not to have been permitted to set off the bonds offered in evidence, which had been given by the plaintiff, and duly assigned to the defendant, before the commencement of this suit. It has been repeatedly ruled in this court, that we will recognise and protect the rights of an assignee of a *chose in action*. (1 *Johns. Rep.* 531. 3 *Johns. Rep.* 426). This doctrine was carried so far, in the case of *Andrews v. Beecker*, (1 *Johns. Cas.* 411), that a release by the obligee of a bond, after an assignment of it, and notice to the obligor, was held a nullity, and not to be regarded. This is conformable to what is laid down by the court of C. B. in *Legh v. Legh*; (1 *Bos. & Pull.* 448); and *Eyre*, Ch. J. adds, *that it follows, as a necessary consequence, that the obligor, in such case, cannot be permitted to plead payment of the bond to the obligee. The assignee seems to be recognised as the real party in the suit, except not allowing him to bring the suit in his own name. And this arises from what *Buller*, J. (4 *Term Rep.* 340) calls a quaint maxim laid down in our old books, that for avoiding maintenance, a *chose in action* cannot be assigned. "The good of that rule," he says, "seems very questionable, and in early as well as in modern times, it has been so explained away, that it remains, at most, only an objection to the form of the action, in any case." Although he admits that courts of law have adhered to the formal objection that the action shall be brought in the name of the assignor, yet, he sees no use or convenience in preserving that shadow, when the substance is gone; and that it is merely a

shadow is apparent from the later cases, in which the courts have taken care that it shall never work injustice. The case of *Bottomly v. Brook*, in the C. B. referred to by Mr. Justice *Ashhurst*, in *Winch v. Keeley*, (1 *Term Rep.* 623), is a very strong case on this subject. It was an action of debt on a bond. The defendant pleaded that the bond was given for securing money lent to the defendant by *E. Chancellor*, and was given, by her direction, to the plaintiff, in trust for her, and that *E. Chancellor*, before the action brought, was indebted to the defendant in more money than the amount of the bond. To this plea there was a demurrer, which was withdrawn by the advice of the court. So that the court did not look to the person on the record legally entitled, but to the person beneficially interested. The authority of this case was afterwards recognised by the K. B. in the case of *Rudge v. Birch*; (cited 1 *Term Rep.* 622); and in *Winch v. Keeley*, Mr. Justice *Ashhurst* says, "It is true, that formerly courts of law did not take notice of an equity or a trust, but of late years, as it has been found productive of great *expense to send parties to the other side of the hall, they have not turned them round upon this objection. Then, if this court will take notice of a trust, why should they not of an equity. It is certainly true that a *chose in action* cannot strictly be assigned; but this court will take notice of a trust, and see who is beneficially interested." Courts of law have lately been more liberal in noticing and protecting the rights of assignees of *choses in action*; and some principles formerly adopted on this subject have been overruled. In the case of *Bauman v. Radenius*, (7 *Term Rep.* 666), a case is mentioned by the counsel, in argument, where an action was brought in the name of a nominal plaintiff, by the persons beneficially interested, and Lord *Mansfield*, upon the trial, allowed the defendant to produce a release from the nominal plaintiff, and which he held conclusive. But this is directly at variance with the decision of this court in the case of *Andrews v. Beecker*; and of the C. B. in the case of *Legh v. Legh*. The right of an assignee to avail himself of a set-off, in a case precisely like the present, has been recognised by the Supreme Court of *South-Carolina*, in the case of *The Administrator of Comply v. Alken*. (2 *Bay*, 481). Considering that the statute of set-off ought to be, as it always has been, liberally expounded to advance justice, and prevent circuity of action, we are of opinion that the set-off ought to have been admitted; and we the more readily adopt this course, because it appears to be most in harmony with the general rules that have governed this court in protecting the rights of assignees.

A new trial must, therefore, be awarded, with costs to abide the event of the suit.

NEW-YORK,
May, 1811.
TUTTLE
V.
BEEKE.

[* 156]

NEW-YORK,
May, 1811.

BRUSH
v.
BOGARDUS.

SPENCER, J. observed, that though he concurred in the opinion of the court, he did it with hesitation, as he thought the decision went much further than courts of law had gone before, on this subject.

New trial granted

[*157]

*BRUSH against BOGARDUS.

The master of a sloop sailing on the Hudson river, between Poughkeepsie and New-York, enrolled as a coasting vessel, and sailing under a license, is not a mariner employed in the sea-service, and exempt from militia duty, within the purview of the second section of the act of congress, (2d cong. 1st sess. c. 33), passed May 8, 1792, but is liable to militia duty, under the laws of this state.

Whether the decision of a court martial, under the militia law, on a question of which they have due cognizance, can be reviewed or traversed in a collateral action? *Quare.*

[*158]

IN error, on *certiorari*, from a justice's court. *Bogardus*, the defendant in error, sued *Brush* before the justice, for two dollars of debt. The defendant pleaded *nil debet*; and there was a trial by jury.

Brush was president of a court-martial held at Poughkeepsie, the 24th *October*, 1810, and exacted from *Bogardus* a fine of two dollars, for his non-attendance at the battalion or regimental parade, on the 15th of *September*, 1810. *Bogardus* alleged that he was not liable, by law, to do military duty.

Brush, in his justification, gave in evidence the act of congress, (*Laws*, vol. 2, p. 92), passed *May 8, 1792*, (2d cong. 1st sess. c. 38), and also the law of this state, *passed April 2, 1810*, (33d sess. c. 121, s. 24). *Vid. 1 R. S. 286, sec. 5*), by which it is provided, among other things, that if the delinquent is a person employed in the coasting trade, the fine shall not be increased.

The plaintiff produced a permanent enrolment of the sloop *Cornelia*, of Poughkeepsie, as a coasting vessel, and a license for her, to the plaintiff, for one year, dated 18th of *October*, 1810. The plaintiff also proved that he had sailed in the said sloop, as master, since the year 1807, and produced a return of the seamen, dated *October 18, 1810*. The plaintiff relied also on the 2d section of the act of congress, (2d cong. 1st sess. c. 33), which exempts from military duty "all mariners actually employed in the sea-service of any citizen or merchant, within the *United States*; and all persons who now are, or may hereafter be exempted by the laws of the respective states." He also produced the second section of the act for the relief of sick and disabled seamen, (*Laws of the United States*, vol. 4, p. 223), passed *July 17, 1798*, (5th *cong. 2d sess. c. 94), by which all seamen employed on board of licensed coasters are compelled to pay hospital money, in the same manner as seamen employed in foreign trade, and the masters are required to make returns of them to the collectors; also another act, on the same subject, (vol. 6, p. 118

174), passed *May 3, 102*, (7th *cong.* 1st *sess.* c. 51), which provides, that all seamen or persons employed on board of coasters, rafts, and flats, going down the *Mississippi* to *New-Orleans*, shall be considered as seamen of the *United States*, and entitled to hospital relief. The plaintiff also read in evidence the second section of the act of congress, passed the 18th of *February, 1793*, (*Laws of the United States*, vol. 2, 168. 2d *cong.* 2d *sess.* c. 8), by which coasting vessels enrolled have the same qualifications, and are subject to the same requisites, as registered ships.

NEW-YORK,
May, 1811.

BRUSH
v.
BOGARD

The defendant objected, that though he gave a receipt for the money, he was not responsible individually, having acted only as president of the court-martial; but this objection was overruled by the justice. The defendant proved that the plaintiff was within the regimental district, and had regular notice to attend the parade, and that having been returned as a delinquent, was fined by the court.

The justice charged the jury, that under the laws of this state the fine had been duly assessed; and if the jury thought there was nothing contrary to the laws of the *United States*, they ought to find for the defendant; but that it appeared from the practice of the custom-house, that the plaintiff and the crew of the sloop were considered as seamen under the act of congress; and if the jury were of that opinion, they ought to find for the plaintiff.

It appeared, also, that the court-martial was duly constituted, and that *Bogardus* appeared before the court and made his defence, which was, that he was master of the sloop *Cornelia*, having a coasting license, and, as a *seaman, was exempt from militia duty by the laws of the *United States*.

The jury found a verdict for the plaintiff, on which the justice gave judgment.

The cause was submitted to the court, on the return to the *certiorari*, without argument.

* 159

Per Curiam. The plaintiff below claimed exemption from militia duty because he commanded a sloop which sailed on the *Hudson* river, between *Poughkeepsie* and *New-York*. The exemption in the act of congress, (*Laws United States*, vol. 2, 93), applicable to the case, is, "of all mariners actually employed in the sea-service of any citizen or merchant within the *United States*." The plaintiff was certainly not a mariner within the purview of this act, for he had nothing to do with the sea-service. The act of this state, (33d *sess.* c. 121, a. 24), adopts this construction; for it admits expressly, that "persons employed in the coasting-trade" are not to be exempted from duty, and the consequent penalty for omis-

NEW-YORK,
May, 1811.

M'INTYRE
v.
SCOTT.

sion to perform it. (a) This point is sufficient to reverse the judgment, and the court, therefore, forbear to give an opinion, whether the decision of a court-martial, on a question of which they have due cognisance, can ever be reviewed or traversed in a collateral action. The judgment below must be reversed.

(a) But by the revised statutes, every person actually employed by the year or season, on board any vessel, in the merchant service or coasting-trade, unless in cases otherwise specially provided, shall be exempt from military duty, except in cases of war, insurrection, or invasion. (1 R. S. 286, s. 5.)

M'INTYRE and BRADFORD *against* SCOTT.

A mortgagee
of a ship, out
of possession,
is not liable for
repairs or ne-

[* 160]
cessaries fur-
nished the ship.
(a)

THIS action was brought to recover the value of articles furnished by the plaintiffs, who were ship-chandlers, for the brig *Ceres*.

The brig arrived from a voyage the 17th *November*, 1807. Being in want of ship-chandlery, the plaintiffs *supplied the articles, from time to time, on the order of *Charles Dayton*, the master. The brig was owned by *Henry Wylie*, who resided in *New-York*, where she was registered; and when in port, previous to her last voyage, was supplied by the plaintiffs, on the order of the master, and they were paid by *Wylie*. When the articles in question were furnished, *Wylie* was in good credit; and the defendant having lent him a note for two thousand dollars, dated 30th *November*, 1807, payable in sixty days, for his accommodation, took from him a bill of sale of the brig, which was, in its terms, an absolute bill of sale, being in the usual form, dated the 30th *November*, 1807; and on the 9th *January*, 1808, it was deposited at the custom-house, for the purpose of preventing a register being granted to any other person. The bill of sale was taken by the defendant, as *collateral security*, for the payment of the note when it should fall due; and a writing or *defeasance* was executed by the defendant and *Wylie* to that effect, at the time the bill of sale was executed, which was not, however, attached to the bill of sale, nor deposited at the custom-house with it. *Wylie* stopped payment before the note became due, and it was taken up by the defendant.

After the bill of sale was executed, *Dayton*, the master, continued in possession of the brig, acting under the orders of *Wylie*; and after the defendant had paid the note, he applied to *Wylie* for the repayment of the money, or that the brig should be delivered into his possession; but *Wylie* and *Dayton* both refused to give up the brig to the defendant,

and she continued to remain in their possession and under their control, until the 3d *May*, 1808, when *Wylie* repaid the two thousand dollars, with interest, to the defendant; and, by direction of *Wylie*, the defendant executed a bill of sale of the vessel to *Dayton*, in the usual form; and for the purpose of making such conveyance, the defendant took out a register, and took the oath prescribed by law, for that purpose.

*The plaintiff furnished the articles, between the 20th *November*, 1807, and the 8th *January*, 1808, inclusive; and *Wylie* stopped payment on the 9th *January*, 1808. The plaintiff knew nothing of the bill of sale to the defendant, until after he had conveyed her to *Dayton*, who continued, during all the time as the master; and his wages, the wharfage, and other charges, were paid by *Wylie*. The articles furnished by the plaintiff were necessary for the repair of the vessel, and were charged to the brig *Ceres* and owners.

A verdict was taken, by consent, for the plaintiff, subject to the opinion of the court, on a case containing the above facts.

S. Jones, jun. for the defendant, was stopped by the court, who desired to hear the other side.

Wells, contra. The general question is, how far a mortgagee of a ship, not in possession, is liable for necessaries furnished for the ship? The cases in *England* in which it has been decided that the mortgagee was not liable, are those where the credit was given to, and the contract made with, the mortgagor.

In *Jackson v. Vernon*, (1 *Hen. Bl.* 114. See also, *Chinnery v. Blackburne*, in note, p. 117), the goods were supplied by order of *Palmer*, the owner, and therefore the credit was given to him. The court, too, in that case, relied on the cases of *Eaton v. Jacques*, (*Doug.* 454, and note (1) 461. *Walker v. Reeves*), as analogous and in point, where it was held that the person to whom a term had been assigned, by way of mortgage, was not liable on the covenants to the lessor; but that case is much shaken, if not entirely overruled, by Lord *Kenyon*, in *Westerdell v. Dale*. (7 *Term Rep.* 306). His lordship says, "As to the cases respecting the mortgagee; whether in or out of possession, he is the legal owner, and must be so considered in a court of law, notwithstanding his title is subject to equitable interests;" and he held, that if there was any difference between the mortgagee of real and personal property, the *distinction afforded a strong argument against the mortgagee of a ship.

The present case is distinguishable from that of *Jackson v. Vernon*, and is the precise case which *Abbott*, (*Abbott on Vol. VIII.* 16

NEW-YORK,
May, 1811.

M'INTYRE
v.
Scott.

[* 161]

[* 162]

NEW-YORK,
May, 1811.

MINTRY
v.
SCOTT.

Ship. 3d edit. 20, 21), says is still undecided in *England*. He observes that "the general question will most properly arise in the case of a contract made by the master in that character; and this is precisely the case here. This court must, therefore, decide the general question. The subject was discussed by the counsel in *Hodgson v. Butts*, (3 *Cranch*, 140), in the Supreme Court of the *United States*, but the question was not decided by the court.

If the defendant was not in the actual possession, he had the power to take possession at any time. The master was his agent or trustee, and was bound to deliver him the possession. If he refused to give possession, the defendant had no occasion to resort to an action, but might turn the master out when he pleased. The defendant was the legal owner, and had the legal dominion over the ship. The bill of sale was absolute; and as the defeasance, or condition was, afterwards, broken, all the right of *Wylie*, if he had any, was completely gone.

Per Curiam. The opinions of the judges in *Jackson v. Vernon*, went upon the ground, that a mortgagee of a ship, *out of possession*, was not liable for necessaries furnished the ship, for he does not take the freight. This is precisely such a case. All the supplies were furnished before the note, for which the ship was mortgaged as security, became payable. No credit was given to the defendant. He was not known until after the goods were delivered. He never had the possession of the brig, nor could he obtain it; and the debt has since been paid, and the pledge redeemed. It would greatly impair the value of such security, if a mortgagee, *out of possession*, were to be made liable for goods so furnished to the ship. There must be judgment for the defendant.

NEW-YORK,
May, 1811.

HAFF

v.

MAR. INS. CO.

*HAFF against THE MARINE INSURANCE COMPANY.

THIS was an action on a policy of insurance on the schooner *Lucy*, at and from *New-York* to a port in *North-Carolina*, and at and from thence to *Port Antonio*, and *Annotto Bay*, in *Jamaica*, valued at three thousand dollars. The policy contained the clause, "That if the vessel, upon a regular survey, should be thereby declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage on account of her being unsound or rotten, that the assurers shall not be bound to pay their subscription on the policy." The vessel arrived at *Port Antonio*, after experiencing violent storms and very bad weather on the voyage from *North-Carolina*; so that it became necessary to have her surveyed. Accordingly a survey was ordered, which was made the 29th of *October*, 1806, by three surveyors, under oath. This survey, under the hands and seals of the surveyors, was among the preliminary proofs, and produced in evidence at the trial. It stated, that "her timbers, fore and aft, were rotten, and the oakum worked out of the wood ends forward; the foremast sprung, her main cross-trees, main transom, rudder head, deck knees, and her cieling in general, rotten; her flying jib, foresail, topsail, and all the other sails, with the hulk, not sufficient to proceed on her intended voyage." And the survey concluded with the "opinion, that she was not worthy of the necessary repairs, and ought to be sold for the benefit of all concerned." The plaintiff read in evidence the deposition of the master, which stated that the vessel, during her voyage from *North-Carolina* to *Port Antonio*, sustained great damage in her hull, sails, rigging and masts, and could not be repaired but at an expense greatly exceeding her value; and on that account *it was determined to break up the voyage and sell the vessel, as best for all parties concerned, which was accordingly done. The plaintiff's counsel then offered further evidence of the seaworthiness of the vessel, at the time she sailed on her voyage, and that she was not unsound or rotten when she was surveyed; but the counsel for the defendants objected to the evidence, and moved for a nonsuit, on the ground that the survey at *Port Antonio* was conclusive evidence of the unseaworthiness.

The judge overruled the motion, considering the survey as *prima facie* evidence only; but the point was reserved.

The plaintiff's counsel then offered to prove that *William Rogers*, a master of a vessel, one of the persons who made

(a) *Vide Brandegu v. National Ins. Co.* 90 Johns. Rep. 328. *Griswold v. National Ins. Co. 3 Cowen's Rep. 96.* *Salus v. Commercial Ins. Co.* 10 Johns. Rep. 487. *Dorr v. Pacific Ins. Co. Wheat Rep. 582.* *Janny v. Columbia Ins. Co.* 10 Wheat. Rep. 411.

A policy of insurance contained a clause, "that if the vessel, upon a regular survey, should be declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage, on account of her being unsound or rotten, the insurers should not be bound to pay their subscription." The survey stated injuries arising from storms, besides the decay of her timbers. It was held, that as the survey and condemnation for unseaworthiness did not proceed on the sole ground of rottenness or decay, but on that fact connected with other matters, it was not conclusive, and the insured were entitled to recover. (n)

[* 164]

NEW-YORK, and signed the survey at *Port Antonio*, had declared, and which declaration was contained in his deposition taken before a notary in *New-York*, "that the vessel was not condemned on account of rottenness, or defectiveness of her timber or hull, but because the injuries she had received were such as to render it impossible to effect her repairs at *Port Antonio*, without an expense equal to or beyond her value, when repaired." The counsel for the defendants objected to this proof; and the judge refused to admit it, unless the notary would swear that he had read the deposition to *Rogers*, or knew its contents, when *Rogers* made oath to it; and the notary not being able to prove this, but merely that such a deposition had been sworn to before him, the judge rejected the proof.

[* 165]

Two masters of vessels and a ship carpenter were examined as witnesses, on the part of the defendants, who testified, that a vessel being rotten, as described in the survey, would not be fit to go to sea; but one of the witnesses said he knew the vessel insured, and that she was a good vessel, and perfectly seaworthy, when she left *New-York*, *on the voyage insured; all the witnesses said, that if she was seaworthy when she left *New-York*, her timbers would not have been in the condition described in the survey.

The judge charged the jury, that if they believed the facts stated in the survey to be true, they ought to find for the defendants; but if they believed the witnesses for the plaintiff, they ought to find for him, saving the question as to the conclusiveness of the survey, for the decision of the court. The jury found a verdict for the plaintiff for a total loss.

Wells, for the plaintiff. The clause in the policy alters the settled law on the subject, as between the parties. It transfers the inquiry, as to the truth of the fact, to the place where the survey happens to be made. It gives a decided advantage to the insured over the insurer; and the court will not, under these circumstances, feel disposed to go beyond the strict letter of the contract, in order to hold a survey conclusive evidence of the fact. We contend that the survey is only *prima facie* evidence, and may be contradicted.

In the case of *The Marine Insurance Company of Alexandria v. Wilson*, (3 *Cranch*, 187,) the counsel for the insurers, Mr. *Lee*, argued that the proof of unsoundness or rottenness must have *reference* to the commencement of the voyage; and though the Supreme Court of the *United States* did not decide the general question whether such a survey was conclusive evidence, yet they held that as there was no evidence referring the unsoundness to the commencement of the voyage, the report of the surveyors, itself, was not sufficient evidence

of the fact. in the case of *Garrigues v. Coxe*, 1 *Binney's Rep.* 592,) it was held that the causes of condemnation stated in the survey must be confined to unsoundness or rottenness, and not be founded on accident or other circumstances. The case of *Watson and Hudson v. The Insurance Company of North America*, (Condy's edit. of *Marshall on Insurance*, 159, b, note,) in the Circuit Court of the *United States*, for the district of *Pennsylvania*, April 8, 1808, was decided on the same principle, that the survey or condemnation must proceed on the *sole* ground of *unsoundness* or *rottenness*, in order to be conclusive. The case of *Amroyd v. The Union Insurance Company*, (2 *Binney's Rep.* 394,) decided in the Supreme Court of *Pennsylvania*, 1808, is very analogous to the present. The survey in that case stated injuries by storm, as well as from decay, and the surveyors concluded by saying, "therefore they are of opinion the vessel is unworthy of repair and unfit for sea." The court held the condemnation to be no bar, not being founded on unsoundness or rottenness. How can it be said that the condemnation, in such a case, is founded on the rottenness of the timbers, more than on the injuries arising from storms and accident?

NEW-YORK,
May, 1811.
HAPP
v.
MAR. INS. CO
[* 166]

Colden, contra. The clause in the policy is clear and explicit; and being the contract of the parties, the court are bound to give it effect. It is not, if the vessel is condemned for rottenness only, but if she is declared unseaworthy, by reason or on account of being unsound or rotten. It is not necessary that the unsoundness should be the consequence of rottenness only; she may become unsound from accidents arising during the voyage. Though the survey does not conclude that the vessel was unsound, by reason of rottenness, yet it states facts from which that conclusion necessarily results. Every material timber, every part of the hull, is found to be rotten; and though other defects are mentioned, they do not impair the effect of the survey, when sufficient facts are stated to justify the conclusion that she was unseaworthy on account of being rotten.

This clause was introduced into policies, for the express purpose of making these surveys conclusive evidence of the fact. If they are not to be considered as conclusive, the clause is nugatory; for before the introduction *of it into the contract, surveys were always held to be *prima facie* evidence.

Again, the declarations of *Rogers* cannot be admitted to contradict the document subscribed by him, and which made part of the preliminary proofs.

Per Curiam. The survey, and condemnation, in this case, do not proceed on the *single* ground that the vessel was un-

[* 167]

NEW-YORK, sound or rotten, but on that fact, connected with other defects and circumstances; and it is, therefore, impossible for the court to say, whether the single cause of rottenness would have been deemed by the surveyors to be, of itself, a sufficient cause of condemnation for unseaworthiness. The survey, then, in this case, is not to be received as conclusive. The cases of *Garrigues v. Cox*, and *Amroyd v. The Union Insurance Company*, which have been cited, are in point; and if the case were otherwise doubtful, those decisions deserve great weight.

DEERS
v.
WYNKOOP.

The evidence of the declaration of *Rogers* was admissible; because, though the plaintiff offered the survey as preliminary proof, yet the defendant offered it as proof in chief; and the plaintiff had a right to show the contradictory declarations of *Rogers*, as a witness for the defendant. The plaintiff is entitled to judgment.

Judgment for the plaintiff. (a)

(a) See 4 *Johns. Rep.* 132. S. C.

[* 168]

*DENN, *ex dem.* DEMAREST and Wife, *against*
WYNKOOP.

A. and his wife, in 1771, executed a mortgage in fee, of the land of the wife, to B., and A. afterwards, in 1788, for the consideration of 125 pounds, granted and released the premises to B., the mortgagee, his heirs and assigns, forever; and B. retained the mortgage in his hands, and made an endorsement thereon, by which he cov- enanted not to bring any action against A. or his representatives, for the money due on the mortgage, and declaring that the mortgage was kept on foot, merely to protect the title of B. and his heirs in the premises.

In an action of ejectment, brought by A. and wife, against a person claiming under B., it was held, that the covenant endorsed on the mortgage was no satisfaction or discharge of the mortgage, in law or equity; but the mortgage being unredeemed, the title under it, set up by the defendant, claiming under B., was a good and valid defence.

Whether the mortgage is now redeemable, or not, is a question for the Court of Chancery to decide.

October, 1765. *Hannah*, one of the daughters, having, before the death of the testator, married *Wiert Banta*, he and his wife were one of the parties to the deed, which recited, among other things, that *Wiert Banta* and his wife had drawn to their share one equal ninth part of the estate, which was particularly bounded and described. And the other children, parties also to the deed of partition, grant, bargain, sell, alien, release and confirm "unto the said *Wiert Banta* and his wife, in their actual possession, now being by virtue of the premises, and to their heirs and assigns for ever; all," &c. (describing the premises in question): "to have and to hold the said lots," &c. "unto the said *Wiert Banta* and *Hannah* his wife, their heirs and assigns, to the only proper use and behoof of the said *Wiert Banta* and *Hannah* his wife, their heirs and assigns for ever, in severalty." The deed contained mutual covenants, as to title and quiet enjoyment, &c.

Hannah, the wife of *Wiert Banta*, had three children, *Hannah*, *Frances*, and *Catharine*. *Hannah* married one *Allington*, and lived on the premises during the *American* war, but left the country with her husband, at the evacuation by the *British*, and had not been heard of for many years, and was supposed to have died, without issue. *Frances* married *Nicholas Nagel*. *Catharine* married one *Lozier*, and died in 1782, about four years after the death of her mother. *Lozier* is still living. *Catharine* left a daughter named *Hannah*, who was born about a year before the death of her mother, and afterwards married *John Demarest*, the lessor.

It was proved, on the part of the defendant, that *Wiert Banta* and his wife, on the 29th *March*, 1771, executed a mortgage in fee of the premises in question, to *Gabriel Ludlow*, to secure the payment of 300 pounds with interest. The mortgage was duly registered, the 30th *March*, 1771, and recited the seisin of the ancestor, *Philip Minthorne*, his death, and the deed of partition. The mortgage contained a covenant, on the part of *Wiert Banta*, his heirs, executors, &c. to pay the money; and a power from *Banta* and wife to the mortgagee, in case of default, to sell the premises, and the surplus money, after paying the debt and charges, was to be paid over to *Banta*. *Daniel Ludlow*, one of the children of *Gabriel Ludlow*, became legally possessed of the bond and mortgage; and *Wiert Banta*, *Nicholas Nagel*, and *Frances* his wife, on the 7th *May*, 1788, for the consideration of 125 pounds, granted, bargained, sold, released, and confirmed the premises to *Daniel Ludlow*, his heirs and assigns for ever, with the usual covenants of seisin, against encumbrances (except the said mortgage) and warranty. On *the back of the mortgage was the following endorsement in

NEW-YORK,
May, 1814.
DENN
v.
WYKKEER.

[* 169]

[* 170]

NEW-YORK, writing, dated 7th *May*, 1788, duly executed by *Daniel Ludlow*. "I do hereby covenant and agree, to and with the within-named *Wiert Banta*, that no action shall be brought against the said *Wiert Banta*, his heirs, executors or administrators, for the money, within mentioned, or any interest thereon; this mortgage being only kept on foot, to protect the estate of me and my heirs and assigns, in the premises, within granted and described." *Daniel Ludlow* conveyed the premises in fee, to *Petrus Stuyvesant*, who, afterwards, conveyed them in fee, to the defendant. *Ludlow*, and those claiming under him, have been in possession since the 7th *May*, 1788.

DENN
v.
WYNKOOP.

D. B. Ogden and *Boyd*, for the plaintiff. Though the deed of partition grants the premises to *Wiert Banta* and his wife, to hold to them, their heirs and assigns for ever; it is evident from the whole tenor and language of the deed, that it was intended merely for the partition of the estate, held in common among the children of *Philip Minthorne*, so that each of the children might hold in severalty, what was before held in common. It was not intended that any estate should be granted or vested in *Wiert Banta*; and the deed ought to be so construed as to carry into effect the manifest intent of the parties.

The word *grant* does not necessarily mean a grant *in fee*. It may be used, at the election of the party, for a confirmation or surrender. (*Co. Litt.* 301, b. 302, a. 2 *Saund.* 96. note 1).

The words *bargain* and *sale* have been introduced since the statute of uses, and are merely to declare the use. The term *release* has no operation; for one tenant in common cannot release to another. (*Co. Litt.* 200. b). The word "confirm" creates no new estate; it only makes the former estate more sure. But it may, perhaps, be said, that by the *habendum*, an estate of inheritance is vested in *Banta* and his wife; but if the *habendum* is repugnant to the premises, it is inoperative. (*Perkins*, 161). That there is a covenant *of warranty on the part of *Banta* and wife, proves nothing, for every partition implies, and has annexed to it, a warranty in law. (*4 Cruise*, 143, c. 8, s. 10). We contend, then, that the words used in the partition do not create or vest any estate in *Banta*, the husband, but merely confirm the interest of the wife in severalty. The next point is, whether *Hannah*, the wife, has done any thing to bar her heir at law.

The covenant endorsed on the mortgage, we contend, amounts to a release of the debt; and the mortgage or security, which is the incident, is thereby extinguished and gone. (*1 Johns. Rep.* 590. *4 Johns. Rep.* 42). A covenant perpet-

[* 171.]

ual not to sue, is a defeasance or release. (5 *Bac. Abr.* 683. *Release*, A. 2). Can, then, a mortgage executed by the wife, which has been satisfied, be used in bar of her heirs? A reconveyance by the mortgagee is not necessary to revest the estate. The moment the debt was released, or the money was paid, there was an end to the mortgage; and the estate of the mortgagor remains as if no mortgage had ever been executed.

NEW-YORK,
May, 1811.
DENN
v.
WYNKOOP

Slosson and *Hoffman*, contra. Here was a mortgage in fee; and the mortgagee in possession from 1798; the money not having been paid, the legal estate became absolute in the mortgagee. The equity of redemption was reserved, by the mortgagee, to *Wiert Banta*, and he released it to the mortgagee in possession, so that there is a complete conveyance of the legal title and estate to *Ludlow*; and the heirs of *Banta* and wife, must be for ever barred. Where the legal estate is out of the lessor in ejectment, the plaintiff cannot recover. (5 *East*, 138. 7 *Term Rep.* 49. *Bull. N. P.* 110. 3 *Johns. Rep.* 386. 2 *Johns. Cases*, 321. 2 *Johns. Rep.* 84. 221).

The covenant endorsed on the mortgage does not, in terms, or on the face of it, amount to a release; it can be a release only, in effect, or by implication. A covenant not to sue one of two obligors is not a release, but an agreement. (7 *Johns. Rep.* 207. 8 *Term Rep.* 168. 12 *Mod.* 556. 1 *Ld. Raym.* 690). If the party has any further right than that against which he covenants, it is not a release, but a covenant.

*The release from *Banta* and wife to *Ludlow*, was executed on the same day with the covenant. It recites the mortgage; and in the covenant against encumbrances, this mortgage is expressly excepted, showing, most clearly, that *Ludlow* meant to take the land for the debt; and that the mortgage money was not paid.

[*172]

If the partition deed operated as a conveyance in fee to *Wiert Banta* and wife, they held as joint-tenants; and *Wiert Banta* having survived, the whole estate was in him. We may suppose that the wife intended that the estate should be conveyed to her husband; and the partition deed was so drawn in order to fulfil that intention.

Per Curiam. The defendant sets up a title under the mortgage, executed by *Banta* and his wife to *Gabriel Ludlow*, and if that mortgage interest has not been redeemed, it forms a good defence to the action. The endorsement upon the mortgage by *Daniel Ludlow*, who claimed the interest under it, was no satisfaction and discharge of the mortgage, either at law or in equity. It is very clear that it was not so intended. The land was taken for the debt, and *Ludlow* re-

NEW-YORK.
May, 1811.

TAYLOR
v.
BRYDEN.

tained the mortgage, to secure his title, as the release of *Banta* alone did not secure the fee. This is the express language of the endorsement, and it would be unjust to take the land from him, or his assigns, without payment of the debt for the security of which the mortgage was created. Whether the mortgage be redeemable, or not, at this late day, is a question that belongs to the Court of Chancery, and not to this court to decide. The defendant is entitled to judgment.

1 2
Judgment for the defendant.

[* 173]

*TAYLOR against BRYDEN.

An action of *assumpsit* was brought on a judgment obtained against the defendant, in the state of *Maryland*, as endorser of a bill of exchange.

The cause was tried before Mr. Justice *Thompson*, at the last *April* sittings, in *New-York*.

The plaintiff produced in evidence a regularly certified copy of the judgment recovered against the defendant, in *Maryland*, as endorser of a bill of exchange. The bill of exchange was drawn by *C. F. T. Biske*, on *F. A. & D. H. Rucker*, Esqrs. of *London*, for 230*l.* sterling, at 60 days sight, in favor of *W. B. Magruder*, who endorsed it to the defendant, who endorsed it to the plaintiff. The bill was dated the 23d *July*, 1799; and was noted on the face of it, for non-acceptance, on the 14th *September*, 1799.

It also appeared, by a copy of the protest for non-acceptance, taken from the books of the notary, in *July*, 1804, by another notary, that the bill was regularly protested for non-acceptance, on the 14th *September*, 1799, the notary who made the protest being since dead. It also appeared, by a copy of the protest for non-payment, that it had been regularly protested for non-payment on the 16th *November*, 1799.

It appeared further, from the *record*, that the declaration, first filed by the plaintiff, on the 6th *December*, 1800, was upon the protest for non-payment of the 16th *November*, 1799, and having once been fairly litigated and decided, it was not again to be investigated in an action brought in this state, on the judgment.

A judgment obtained in another state, is *prima facie* evidence of a just debt; and it is incumbent on the defendant to impeach the justice of it, or to show, by positive proof, that it was irregularly and unfairly obtained.

(a) *Vide supra*, 88. *Robinson v. Ward's executors*, note (a). The judgment of a court of general jurisdiction in a sister state, being conclusive evidence of the matters therein adjudicated, it follows that *assumpsit* can no longer be maintained upon it in another state; but the action should be *debt*, and the *plea non iei record*. *Andrews v. Montgomery*, 19 *Johns. Rep.* 163

1799; and that on the prayer of the plaintiff, a commission to examine witnesses in *London* and *New-Orleans*, was issued the 11th *May*, 1802. On the 14th *May*, 1805, the plaintiff, it appeared, prayed leave to amend his declaration, by adding a count on the protest for *non-acceptance*, on the 14th *September*, 1799; which *amendment was allowed by the court. The amended declaration contained also the count on the protest for *non-payment*.

NEW-YORK,
MAY, 1811.

TAYLOR
v.
BRYDEN.

[* 174]

The record contained, also, a deposition taken the 3d *March*, 1803, at *Baltimore*, which was read in evidence. It stated that the witness, in the absence of the plaintiff, received, in *November*, 1799, a letter directed to the plaintiff, from his correspondent in *London*, dated 13th *September*, 1799, advising that the bill in question had been protested for *non-acceptance*, of which the witness gave due notice to the defendant, in *February*, 1800; that immediately on receipt of the news that the bills were protested for non-payment, and returned by the brig *John Brockwood*, from *London*, which was given by a letter from the plaintiff's correspondent, dated the 21st *November*, 1799, notice was given to the defendant. It appeared that the vessel, called the *John Brockwood*, by which the first of the set and protests were sent, had been lost and was believed to have foundered at sea, and the witness stated, that as soon as it was believed that she was lost, the plaintiff sent to *London* for the second of the set, which was received by the plaintiff, in *September*, 1800, enclosed in a letter, dated the 28th *June*, 1800; that on receipt of the second of the set, the witness, as agent of the plaintiff, in his absence, called on the defendant and demanded payment; but received no satisfactory answer.

The plaintiff also gave in evidence, the following letter from the plaintiff to the defendant:

" *New-York, October 1, 1799.* "

" Since I wrote you last, I have appointed Mr. *Ray* as my attorney. I have given him particular directions to try to negotiate with you for the amount of the bills for which you have obtained judgment, and it is my wish to have the thing settled amicably; and I hope on your part, you will try to give every indulgence in your *power. It is my particular directions to Mr. *Ray*, the first thing he does, to apply all the funds that is my due for rent, &c. for the discharge of the same."

[* 175]

The defendant then proved, that the mail for the conveyance of letters from the general post-office in *London*, is regularly made up, on the first *Wednesday* in every month, and

NEW-YORK, despatched the same evening, by the government packet, to *New-York*; and that it was the invariable custom of the merchants in *England*, to forward the second of a set of protested bills, by the first opportunity after the first have been sent.

TAYLOR
v.
BRYDEN.

The defendant offered other evidence which was objected to, and rejected by the judge, who charged the jury, that it was not necessary that a *copy* of the protest for non-acceptance should accompany the notice; and that the question of *due diligence* was a subject on which the jury had a right to decide; but, in his opinion, the plaintiff had shown sufficient to enable him to recover. The jury found a verdict for the plaintiff.

A motion was made to set aside the verdict and for a new trial; and the following points were raised by the counsel for the defendant.

1. That the defendant did not receive legal notice of the protest for non-acceptance.
2. That the protest for non-acceptance ought to have been forwarded with the notice; but was not sent till *July*, 1804.
3. That the protest for non-payment ought to have been sent by the first opportunity.
4. That the second of the set of bills ought to have been sent by the next opportunity after forwarding the first.
5. That the letter of the defendant to the plaintiff was conditional, and contained no promise to pay, and was not binding, being written under an ignorance of the defendant's legal rights.

[* 176]

*The cause was argued by *Ray* (of *Baltimore*) and *Slosson*, for the defendants; and by *D. B. Ogden* and *Boyd*, for the plaintiff; but from the opinion delivered by the court, it becomes unnecessary to state the arguments of counsel, which turned chiefly on the question of due diligence and notice.

The defendant's counsel cited 4 *Term Rep.* 175. *Kyd*, 136, 137. 1 *Selwyn's N. P.* 357, note 35, 352. 5 *Esp. Rep.* 157. 1 *Term Rep.* 167. *Buller's N. P.* 271. 2 *Esp. Rep.* 511. 3 *Dallas*, 365. 405. *Kyd*, 164, 166, 224. 6 *East*, 7. 2 *H. Bl.* 6, 226, 227, 565. 2 *Caines*, 344. *Malyne's Lex Merc.* 264.

The plaintiff's counsel cited *Chitty on Bills*, 92. 2 *Esp. Cas.* 511. 4 *Esp. Cas.* 48. 3 *Johns. Rep.* 206. 4 *East*, 481. *Doug. Rep.* 1. 9 *East*, 192. 11 *East*, 118.

KENT, Ch. J. delivered the opinion of the court. The judgment in *Maryland*, upon which this suit was brought, was rendered against the defendant as an endorser of a for-
132

eign bill of exchange, and he now contends that he was not chargeable, by reason of the want of due notice of the non-acceptance, and of the non-payment of the bill. Whether notice of the non-acceptance of the bill, without accompanying that notice with the protest for non-acceptance, was competent, under the law of merchants, to charge the party, is a point which we need not now discuss, as the suit in *Maryland* was upon the *protest* for non-payment, as well as for the non-acceptance; and the non-payment, if supported by the requisite notice and proof, was sufficient to sustain the action. It has been urged to the court that there was not due diligence in giving notice of non-payment, and that the question of diligence is open here for investigation, notwithstanding the trial and judgment in the other state. But we are by no means satisfied that such an inquiry ought now to be pursued, after the question has been once fairly litigated and decided. The question of reasonable notice is a compound of law and fact, to be submitted to a jury. (6 *East*, 3. and 14. *in notis*. 1 *Sch. and Lefroy*, 461. 1 *Campb.* 248.) The judgment in *Maryland* is presumptive evidence of a just demand; and it was incumbent upon the defendant, if he would obstruct the execution of the judgment here, to show, by positive proof, that it was irregularly or unduly obtained. We do not know the whole amount of the evidence that may have been given upon the trial in *Maryland*. The record contains a deposition, but does not state whether any, or what additional proof was given. To try over again, as of course, every matter of fact which had been duly decided by a competent tribunal, would be disregarding the comity which we justly owe to the courts of other states, and would be carrying the doctrine of re-examination to an oppressive extent. It would be the same as granting a new trial in every case, and upon every question of fact. Suppose a recovery in another state, or in any foreign court, in an action for a *tort*, as for an assault and battery, false imprisonment, slander, &c. and the defendant was duly summoned and appeared, and made his defence, and the trial was conducted orderly and impartially, according to the rules of a civilized jurisprudence, is every such case to be tried again here upon the merits? I much doubt whether the rule can ever go this length. The general language of the books is, that the defendant must *impeach* the judgment, by showing, affirmatively, that it was unjust, by being irregularly or unfairly procured.

In the case of *Hitchcock and Fitch v. Aickin*, (1 *Caines*, 460,) this court went no further than to decide the general principle, that a judgment of another state was not conclusive, but was to be placed upon the footing of a foreign judgment under the *English* law. The question then is, how far, and

NEW-YORK,
May, 1811.

TAYLOR
v.
BRYDEN.

[* 177]

NEW-YORK,
May, 1811.

TAYLOR
v.
BRYDEN.

to what extent, do the *English* courts permit foreign *judgments to be opened, to let in a re-examination of the merits.

The case of *Sinclair v. Fraser*, contains the rule of the *English* courts. It was decided by the House of Lords, on the 4th of *March*, 1771, upon an appeal from the Court of *Sessions* in *Scotland*. (Cited by Mr. *Wedderburne*, the solicitor-general, in the case of the *Duchess of Kingston*, 11 *State Tr.* 222.) A suit was brought upon a judgment in *Jamaica*; and the question was, what should be the effect of the judgment; and the Court of *Sessions* refused to give any effect to it, and held the party bound to prove the ground, the nature and the extent of his demand. But upon appeal to the House of Lords, the judgment of the Court of *Sessions* was reversed, and the rule of law was stated in the judgment of reversal; "that the judgment of the court of *Jamaica* ought to be received, as evidence, *prima facie*, of the debt; and that it lies on the defendant to impeach the *justice* of it, or to show that it was *irregularly* and *unduly* obtained." This decision was cited in *Galbraith v. Neville*, (K. B. 29 *Geo. III. Doug. Rep.* 3d edit. p. 5. note,) and Mr. Justice *Buller* said, that it had always been considered as establishing the true rule.

In the present case, the defendant has certainly not succeeded in impeaching the judgment. He has, at most, only excited doubts, under the obscure, and, perhaps, very imperfect testimony before us, as to the fact of due diligence in giving notice of the protest for non-payment. And where the party has once litigated his case, before a competent jurisdiction, and when no fraud or unfairness is pretended, every doubt and every presumption arising on a matter *in pais* ought to be turned against him. We may, with propriety, adopt the observation of Lord *Kenyon*, in the case of *Galbraith v. Neville*, as stated in a note to 5 *East*, 475, that "without entering into the question how far a foreign judgment was impeachable, it was, at all events, clear, that it was *prima facie* evidence of the debt, and that no evidence had *been adduced to impeach this." The motion on the part of the defendant, for a new trial, is therefore denied.

[* 179]

Motion denied

NEW-YORK,
May, 1811.

HOYT

v.

GELSTON and
SCHENCK.

HOYT against GELSTON and SCHENCK.

BALDWIN, for the defendant, moved for an *imparlance*, in this cause, until the first day of next *August* term, and from term to term, until the libel filed by the attorney of the *United States*, for the district of *New-York*, in the district court, against the ship *American Eagle*, shall have been heard and finally determined. He read an affidavit, stating that the defendants, as collector and surveyor of the customs in the city of *New-York*, on the 10th *July*, 1810, caused the ship *American Eagle*, &c. to be seized, as forfeited to the use of the *United States*, for a violation of an act of the *United States*, entitled, "an act in addition to an act for the punishment of certain crimes against the *United States*."

On the 13th *July*, 1810, a libel was filed by the attorney of the *United States* against the said ship, in the district court; on which process issued, and she was seized by the marshal of the district, in whose custody she has since remained. On the 7th day of *November* the plaintiff put in his claim to the vessel, and an answer to the libel; but owing to the indisposition of his honor *Matthias B. Tallmadge*, Esq. judge of the District Court, it has not been possible to bring on the cause to a hearing in that court, and the cause is still depending and undetermined.

The trespass charged in the plaintiff's declaration, and for which this suit is brought, was the seizure of the *American Eagle*, as above stated.

**Baldwin* observed, that if the District Court should condemn the vessel, or grant a certificate of probable cause of seizure, it would be a complete defence to the present action. But if this court can entertain this cause, and suffer it to proceed, it will, in effect, have a control over the District Court of the *United States*, which has exclusive jurisdiction in all such cases.

It may be said, that we might plead in abatement; but this motion is proper and regular. (*Barnes*, 224. *Carthew*, 136. 4 *Bac. Abr. Plead.* 47.) A plea in abatement would not be proper, for a new suit might be commenced, and so *toties quoties*. It is a matter in bar, not in abatement. (*Chitty on Plead.* 435, 445.)

Colden, contra, read the affidavit of the plaintiff, stating, that the process against the ship *American Eagle*, belonging

In an action of trespass against the collector of the port of *New-York*, for seizing the vessel of the plaintiff, against which a libel was filed in the *District Court of the United States*, under a law of the *United States*, but which had not been heard or determined, on account of the sickness of the judge; this court refused to grant the defendant an *imparlance* indefinitely, until the libel could be heard and decided in the District Court.

[* 180]

NEW-YORK,
May, 1811.

HOYT
v.
GELSTON and
SCHENCK.

*181]

to the plaintiff, was returnable in the District Court, on the 3d *August*, 1810. The libel, on the part of the *United States*, alleged that the said ship was fitted out, with intent that she should be employed in the service of a *foreign state*, to commit hostilities on the subjects of another *foreign state*, with whom the *United States* were at peace. The two foreign states referred to in the libel, are the dominions, territories or possessions of the two contending chiefs of the island of *St. Domingo*, *Petion* and *Christophe*. No District Court was held, at which the plaintiff could file a claim, until the 7th of *November*, 1810, when the plaintiff filed his claim and answer, on oath, denying all the charges contained in the libel. No District Court having been held at which the libel could be heard, on account of the indisposition of the judge; and his disability to hold a court continuing, and it not appearing probable that he would be able to hold a court before the stated term of the Circuit Court of the *United States*, in *September*, the plaintiff, by his counsel, in the latter end of *July*, made a formal application *to the *marshal* of the district of *New-York*, in the absence of the attorney of the district, requiring the *marshal* to make such application, as the law requires in such case, to the judge of the Supreme Court of the *United States*, allotted to the circuit of the district of *New-York*, to remove the cause depending in the District Court into the Circuit Court, pursuant to the act of congress, passed *March* 2d, 1809: (10th *cong.* 2d sess. c. 94, 9th vol. *Laws*, 259): but the marshal refused to take any measures, in consequence of such application. The disability of the judge still continuing, and there being no prospect of its being removed before the stated term of the Circuit Court of the *United States* in *April* last, a second application was made to the marshal, in the absence of the attorney of the district, on the 28th of *February* last, for the purpose of having the causes depending in the District Court, removed into the Circuit Court of the *United States*, which application was supported by an affidavit of the disability of the judge, from extreme indisposition to hold a court, and of its probable continuance for a considerable time. But the marshal, though the urgency and hardship of the plaintiff's case were fully stated to him, refused to take any measures in consequence of such application. A similar application was also made to the district attorney, then at *Albany*, who declined taking any measures for the removal of the cause.

Colden observed, that under these circumstances of the case, the court would not be induced to exercise their discretion in favor of the present motion. The court could not intend that the vessel will be condemned, as all the facts in the libel are contradicted on oath. The act of congress

passed the 24th *February*, 1807, (8th vol. *Laws*, 255, 2d *sess.* 9th *cong.* c. 64), provides, that in all cases of seizures, where judgment is given for the claimant, if the judge shall certify that there was reasonable *cause of seizure, the claimants shall not be entitled to costs, nor the person making the seizure be liable to an action on account of such seizure. The certificate of the judge must be founded on facts. But this is not a case in which any such certificate can be given; for there can be no mistake as to fact, but as to *the law*. The ship was libelled under the law of the *United States* of the 5th of *June*, 1797. (1st *sess.* 3d *cong.* c. 50, s. 3.) Can any person, for a moment, suppose that *Petion* and *Christophe*, the rival chiefs of *St. Domingo*, are *foreign princes* or *states* within the meaning of that law? But it is unnecessary to enter into the discussion of this question, at this time.

The judge of the District Court cannot grant a certificate of probable cause, because the libellant has mistaken the law.

This is not a prize question; and the constitution and laws of the *United States* being the supreme law of the land, this court is competent to decide on an act of congress, when brought before them in this collateral way.

T. A. Emmet and *Hoffman*, on the same side, observed, that this was a new and extraordinary application. It was a motion for an indefinite imparlance; and for what reason? There has been no delay or misconduct on the part of the plaintiff; nor is there any thing in the nature of the present action to induce the court to frown upon it. It is not a motion to put off a trial, but to postpone indefinitely the time of pleading. How can the defendants be injured by putting in their plea? As no certificate of probable cause has been given, it cannot be pleaded. Should it be granted after issue joined, it may be pleaded *puis darrein continuance*. A decree of condemnation may be given in evidence under the general issue. It is very important to the plaintiff that issue should be joined as early as possible, in order to obtain an earlier trial of his cause.

*Is there any thing in the law of the *United States* to prevent this court deciding whether *Petion* and *Christophe* are foreign princes, within the meaning of the act of congress? It is not a question of capture or prize, arising under the law of nations. This court can, and must take notice of the law of the *United States*, when it comes *collaterally* before them, in a cause depending here. This court is bound to interpret the law of congress, and is not obliged to wait until another court makes the interpretation for them. (See *Jackson v. Hallett & Bowne*, 1 *Caines*, 60.) Would this court be bound by a certificate of probable cause, without looking at the law

NEW-YORK,
May, 1811
HOYT
v.
GELSTON AND
SCHECK.
[* 182]

[* 183]

NEW-YORK, of the *United States*, and deciding whether the judge of the
May, 1811. District Court had authority to grant it?

Hoyt
v.
GELSTON and
SCHENCK. *Baldwin*, in reply, said that the matter of defence, on the part of the plaintiff, must be pleaded, and could not be given in evidence under the general issue.

Per Curiam. The cause in the District Court has been unnecessarily delayed on the part of the public prosecutor; for the officers of the *United States* may, in case of the sickness of the judge of the District Court, remove the cause into the Circuit Court. An indefinite imparlance, therefore, is unreasonable, and ought not to be granted.

Further time to plead was, however, given, on the motion of the defendant's counsel, until the 1st *July* next.

Motion denied

C A S E S
ARGUED AND DETERMINED
IN THE
Supreme Court of Judicature
OF THE
STATE OF NEW-YORK,
IN AUGUST TERM, 1811, IN THE THIRTY-SIXTH YEAR OF OUR
INDEPENDENCE.

BAYLEY *against* BATES, Sheriff, &c.

THIS was an action on the case, for a false return. The declaration stated, that a judgment was obtained in *February*, 1809, in favor of the plaintiff, against *R. B.* on which a *fi. fa.* was issued, returnable the 25th of *November*, 1809, and delivered to the defendant, as sheriff of the county of *Ontario*, on the 14th of *November*. That the defendant had not the moneys as he was directed, &c., but falsely, maliciously, and deceitfully returned on the *fi. fa.* that he could find no goods or chattels, lands or tenements, of the said *R. B.* in his bailiwick, &c. Plea, the general issue. The cause was tried at the *Ontario* circuit, on the 26th of *June*, 1810, before the *Chief Justice*.

On the *fieri facias* which was given in evidence, the defendant had endorsed a return of *nulla bona*. It was proved, that after the delivery of the writ, and before the return-day thereof, the defendant had levied on a *negro boy*, said to be a slave of *R. B.*, the defendant named in the execution, who brought the negro into this state in 1803, when he removed

and he should unreasonably refuse it, it seems that he is bound to proceed and sell the liable for a false return. (b)

(a) But in an action of trespass, for taking goods not belonging to the defendant, such an inquisition can only go in mitigation of damages. *Townsend v. Philips*, 10 Johns. Rep. 98. And in no case is it conclusive of the right of property, though it may excuse the sheriff for returning *nulla bona*. *Van Cleef v. Fleet*, 15 Johns. Rep. 147. Vide *Hart v. Deamer*, 6 Wendell, 497.

(b) *Acc. Van Cleef v. Fleet*, 15 Johns. Rep. 147

An inquisition made by a sheriff's jury to ascertain whether the property in goods, taken on a *fieri facias*, is in the defendant or not, if found not to be in him, is a justification to the sheriff, for returning *nulla bona*, and a conclusive defense in an action against him for a false return; unless it be shown that he did not act with good faith. (a)

But if an adequate indemnity is tendered to the sheriff, the goods, or be

ALBANY,
August, 1811.

BAYLEY
v.
BATES.

into *Ontario* *county, from the state of *Maryland*; and had filed in the proper office, the affidavit and certificate required by law in such case. It was proved that *R. B.* had claimed the negro as his slave. The plaintiff gave notice to the defendant, that the negro was the property of *R. B.*, and offered to indemnify the defendant if he would sell the negro; and protested against a trial of the question of property by a jury, as the slave was not claimed by any other person. The offer of indemnity was verbal, and not accompanied with a tender of any written security or bond. The defendant summoned a jury to inquire into the fact of property; and by an inquisition taken the 20th of *December*, 1809, in the usual form, the jury found that the negro was not, in fact, the property of *R. B.*

The plaintiff's attorney attended before the jury of inquiry; no person appeared to claim the negro, and the only question submitted to the jury was, whether the negro had not become entitled to his freedom, under the act relative to slaves and servants. (*sess. 24, c. 188. 1 R. S. 656.*)

It was proved that when *R. B.* left the county of *Ontario*, the plaintiff, as his agent, let the farm of *R. B.* to another person, with the negro, who labored on the farm, in the service of the lessee, for one year and nine months, and had afterwards been seen in the service of other persons, some years after *R. B.* had left the county; and that before the delivery of the execution to the defendant, he had hired himself out to labor, and had been at large, in different parts of the county.

The *Chief Justice* charged the jury, that the *inquisition* was conclusive in favor of the defendant, unless the plaintiff proved that the defendant had acted dishonestly and fraudulently; and that to entitle the plaintiff to recover, he must not only show that the return was false, but that the defendant knowingly, wilfully, and deceitfully, made such false return; and that it was for the jury to decide whether the defendant had acted impartially and with good faith, in taking the *inquisition*. The jury found a verdict for the defendant.

[* 187]

*A motion was made to set aside the verdict, as against evidence, and for the misdirection of the judge.

Sudam, for the plaintiff, contended that the *inquisition* in this case was not conclusive. In *Latkow v. Eamer and Burnett*, (2 *H. Bl.* 437,) the court of *K. B.* held that the proceeding of the sheriff could not be conclusive in any case, for inquests of office were always traversable. At most, the *inquisition* could only go in excuse or mitigation of damages.

To make a sheriff liable, it is enough to show the fact of a *false return*, and the law will presume a want of good faith in the officer. It is not requisite to prove that he acted maliciously or deceitfully.

It was admitted that the negro was a slave, and the inquiry was, whether he had been manumitted according to law. Having been once a slave, he is presumed to continue in that condition until a regular manumission is proved. It does not appear that the jury who signed the inquisition, found that the negro had been manumitted. Is the inquisition to be conclusive, not only as to right of property, but as to the freedom of the slave? Whether he was free or not, was a question of law, not to be decided in this collateral way.

Rodman, contra, observed, that the charge to the jury was not that the inquisition was conclusive as to the right of property, but merely as a protection to the sheriff against this action.

By the fifth section of the act concerning slaves and servants, (*sess. 24, c. 188.*) the negro became free, in consequence of the hiring or transferring for a year and nine months. [1 R. S. 658, sec. 10.] It became necessary, therefore, for the sheriff to have the question tried by a jury.

In the case of *Latkow v. Eamer and another*, the inquisition was after the action was brought. It is said by *Dalton*, (*Dalton's Sheriff*, 146. *Impey's Sheriff*, 153. *Tidd's Pr.* 921. 1 *Sellon*, 557. *Gilb. on Executions*, 21,) and various other writers, that the finding of the jury will excuse the sheriff; and in *Farr v. Newman*, *(4 *Term Rep.* 633, 648,) *Grose*, J. and Lord *Kenyon* agreed that the sheriff might summon a jury to satisfy himself as to the property, and that the inquisition would justify him: and in *Roberts v. Thomas*, (6 *Term Rep.* 88,) Lord *Kenyon* refused to set aside an inquisition in such a case. He said it was for the purpose of indemnifying the sheriff, in making his return to the writ; but did not bind the right of property between the litigating parties. The same doctrine is recognized in *Wells v. Pickman*, (7 *Term Rep.* 177,) where Lord *Kenyon* speaks of the sheriff's making use of the intervention of a jury, so as to avoid all risks.

ALBANY,
August, 1811.
BAYLEY
v.
BATES

[* 188]

Per Curiam. The question is, whether the defendant was protected under the inquest of office from the charge of a false return. It is found that he procured and conducted the inquest with impartiality and good faith; and it appears that the plaintiff had due notice of it, and that there was not any regular indemnity offered to the sheriff, in case he would sell the negro. If then, the return of *nulla bona*, founded upon

ALBANY,
August, 1811.

BAYLEY
v.
BATES.

[* 189]

an inquest, will in any case be a defence in an action for a false return, notwithstanding that the property of the chattel in question did belong to the defendant in the execution, this would seem to be such a case.

The general language of the books is, that these inquisitions will excuse the sheriff in his return of *nulla bona*, and repel the charge of a false return. (*Dalton's Sheriff*, 146. *Gilbert's Law of Executions*, 21. *Tidd's K. B.* vol. 2, 922. *Grose*, J. and Lord *Kenyon*, in 4 *Term Rep.* 633, 648. *Ld. Kenyon*, in 6 *Term Rep.* 88. 7 *Term Rep.* 177. *Impey's Sheriff*, 135, and by the counsel on each side, in *Cooper v. Chitty and Blackstone*, 1 *Burr.* 20. *Gould*, J. in 3 *Wils.* 309.) There is not any express adjudication upon the point; for the usual course for the sheriff is to take an indemnity, by bond, from the plaintiff, if the question of property be doubtful or litigated. There are also other ways pointed out in the books, by *which the sheriff will, in such cases, be protected from harm. The court will, on application, enlarge the time for making a return, until the right of property be tried between the parties, or the sheriff receive a sufficient indemnity. So, if he sells, the money may be retained in court until the right be ascertained, and the sheriff may even, by filing a bill in chancery, compel the parties to interplead. (1 *Keb.* 693. 1 *Burr.* 37. 2 *Black. Rep.* 1064. 2 *Tidd's K. B.* 928. 2 *Bay's Rep.* 67.) But, if none of these steps be taken, and the sheriff summons an inquest, and makes a return accordingly, it will protect him, unless there be circumstances in the case to show that he did not act with good faith. If the sheriff should unreasonably refuse an adequate indemnity, the court would probably hold him bound to proceed and sell, or reject this defence. An action for a false return sounds in *tort* and fraud; and it draws into consideration, in a greater or less degree, the *quo animo* of the defendant.

In the present case, there are no circumstances to deprive the sheriff of the protection which the inquisition ought to give, and the motion for a new trial is denied.

Motion denied.

THOMPSON against KETCHAM.

ALBANY,
August, 1811

THOMPSON

v.

KETCHAM.

THIS was an action of *assumpsit*. The declaration, besides the usual money counts, contained a count on a *promissory note, as follows: "I promise to pay Capt. *Samuel Thompson*, eighty dollars, for value received. *Montego Bay, April 21, 1807.*"

Plea, general issue, with notice that infancy would be given in evidence at the trial.

The cause was tried at the *Ulster* circuit, in *September, 1810*, before Mr. Justice *Yates*.

It was proved that the defendant had acknowledged that the plaintiff had lent him the 80 dollars at *Montego Bay*, in the island of *Jamaica*; and that he could not have done without the money.

The defendant proved that at the time he executed the note, and when he acknowledged the receipt of the money, he was under the age of 21 years.

The plaintiff objected to the insufficiency of the evidence, unless the defendant also proved that by the laws of *Jamaica*, infancy was a defence to an action for the money.

The defendant then offered to prove, that by a *parol* agreement between him and the plaintiff, the money was to be paid on the arrival of the parties at the city of *New-York*, and that both of them arrived here at the same time. This evidence was objected to, but admitted, and a verdict was taken, by consent, for the plaintiff for 99 dollars and 68 cents, subject to the opinion of the court, on a case containing the above facts.

Two points were raised for the consideration of the court; 1. The defendant was bound to show that by the laws of *Jamaica*, infancy would be a defence there, to an action on the note.

2. That the *parol* evidence which was objected to by the plaintiff, at the trial, was inadmissible.

The case was argued by *Sudam*, for the plaintiff, and *Ruggles*, for the defendant. In addition to what was said on the former argument of the same case, (See 4 *Johns. Rep.* 285,) the counsel for the plaintiff, relied also on *the case of *Holman v. Johnson*. (Coup. 341.) In no case, it was contended, where a contract is made in reference to the laws of another country, is the party seeking to enforce the contract, bound to show those laws; but the defendant who seeks an exemption by such laws, must prove them. According to the rules

The time of payment is part of the original contract, and if no time of payment is expressed in a note, the law adjudges it to be payable immediately; and *parol* evidence is inadmissible to show a different time of payment. (a)

The *lex loci contractus* is to govern, unless the parties, by the *terms* of the contract, had in view a different place. (b)

Where the defendant in an action brought here, on a promissory note made in *Jamaica*, set up *infancy* as a defence, it was held that he was bound to show that such a plea would be a good defence in *Jamaica*

(a) Vide *Herrick v. Bonnet*, *infra*, 374. *Lobdell v. Hopkins*, 5 *Cowen*, 516. *M. & F. Bank v. Schuyler*, 7 *Cowen*, 337. *Fitzhigh v. Runyon*, *infra*, 375.

(b) Vide *Andrews v. Herriot*, 4 *Cowen*, 511, note.

ALBANY,
August, 1811.

THOMPSON
v.
KETCHAM.

of special pleading, the defendant must prove the foreign law on which he relies for his defence.

Again, *parol* evidence cannot be received to control the legal import of a known commercial instrument. (1 *Taunt. Rep.* 347. *Hogg v. Smith.*) The note, on the face of it, is payable immediately; and if the defendant had been sued in *Jamaica*, he could not have set up in defence, a subsequent *parol* agreement of the plaintiff to receive the money on his arrival at *New-York*. The *original* contract was complete in *Jamaica*, and cannot be varied by *parol* evidence of a subsequent agreement. The time and place of payment are an essential part of the contract, and must be stated. Where no time of payment is expressed in the contract, it is a conclusion of law, that the money is to be paid immediately. It is not left as a matter of mere presumption or inference; but is fixed, by judgment of law, as clearly as if it was so expressed in the contract.

For the defendant it was observed, that if the defendant had pleaded infancy, a replication that the note was made in *Jamaica* would not get rid of the bar, unless it was also shown by the plaintiff, that by the law of that island, infancy was no bar.

Where a party covenants to pay money, or to do a certain thing, at a certain time, the time of performance may be extended by *parol*. (3 *Esp. Cas.* 35. 1 *Johns. Cas.* 23. 3 *Johns. Rep.* 528.) If, then, *parol* evidence is admissible to extend the time of payment, there is no good reason why it may not be received to show the place of payment. *Parol* evidence may be received to explain a written contract. It may be admitted also to vary an inference or rebut a presumption. (*Rob. on Frauds*, 10, 55, 56, 63, 64.) If the law implies that the note in question is payable on demand, why may not the defendant repel that presumption, by *parol* evidence of an agreement that it should be paid at a certain time and place?

KENT, Ch. J. delivered the opinion of the court. This case presents two questions; 1. Was *parol* evidence admissible that the payment of the note was to be made in *New-York*? 2. If it was not, then on whom did the *onus* lie of proving the law of the island of *Jamaica* on the subject of infancy?

1. When this cause was formerly before the court, (4 *Johns. Rep.* 285,) the admissibility of the testimony relative to the agreement to pay the note in *New-York*, was not drawn in question; for the testimony had been admitted without objection. This point is not therefore to be considered as having been decided in that case. The evidence was not

admissible. The time of payment is part of the contract, and if no time be expressed, the law adjudges that the money is payable immediately. This is not only a positive rule of the common law, but it is a general principle in the construction of contracts. When the operation of a contract is clearly settled by general principles of law, it is taken to be the true sense of the contracting parties; and it is against established rule to vary the operation of a writing by parol proof. There is no ambiguity in this case which requires explanation. The note, upon the face of it, was payable immediately, and the parol proof went to alter, in a very material degree, its operation and effect, by making it not payable, until some distant and undefined period, when the parties should arrive at *New-York*. Suppose the note had been put in suit, in *Jamaica*, before the parties left the island, could it have laid in the mouth of the defendant to say that he was not suable, because the time of payment had not arrived, as he had not arrived in *New-York*. The force and effect of the contract must be determined *from the contract itself, and not by proof *aliunde*. The *lex loci* is to govern, unless the parties had in view a different place, *by the terms of the contract*. *Si partes alium in contrahendo locum respexerint*. This is the language of *Huber*. Lord *Mansfield*, in *Robinson v. Bland*, (2 *Burr.* 1077,) says, the law of the place can never be the rule, where the transaction is entered into with an *express* view to the law of another country, and that was the case with the contract in that cause.

This case does not fall within the range of those cases in which the courts have admitted parol proof of an agreement to enlarge the time of performance. In all those cases, the agreement was *subsequent* to the time of the original contract, and admitted the force and effect of it. (1 *Johns. Cas.* 22. 1 *Esp. N. P.* 35. 3 *Johns. Rep.* 531.) Here the proof, according to the import of the case, went to show the *original* agreement to be different from what the note declared it to be; and it was, therefore, inadmissible.

2. The testimony being rejected, the next question is, which party was bound to prove the law of *Jamaica*. The court cannot know, *ex officio*, what are the rights and disabilities of infants, or when infancy ceases, by the provincial law of *Jamaica*. These questions depend much upon municipal regulations; and what the foreign law is, must be proved, as a matter of fact. This was so ruled by Lord *Eldon* in *Male v. Roberts*. (3 *Esp. N. P.* 163.) The defendant was bound to make out a valid defence, and it therefore lay with him to show that his plea of infancy was good by the law of *Jamaica*. The court are not to know that fact, without proof; and the good sense and logic of pleading show, that it is the duty of

ALBANY,
August, 1811.
THOMPSON
v.
KETCHAM

[* 193]

ALBANY,
August, 1811.

FENTON
v
GARLICK.

[]

the party who interposes a defence to a contract, otherwise binding, to prove every thing requisite to the validity of the defence. It was enough for the plaintiff to rely upon his demand, until it had been legally met by *the plea. If the defendant had specially pleaded *infancy*, he ought to have accompanied it with an averment, that by the law of *Jamaica* he was an infant, and the contract not binding upon him. As the defendant did not prove what the law of *Jamaica* was on the subject, he did not make out his defence, and the plaintiff is entitled to judgment.

Judgment for the plaintiff.

FENTON, Administrator of RAMSDALL, *against* GARLICK, Trustee of GARLICK.

A suit was commenced in 1803, in the state of *Vermont*, against *A.* as trustee of *B.* an absconding debtor, and in 1808, judgment was given against *B.* It having appeared that *A.* had moneys of *B.* more than sufficient to pay the plaintiff, it was ordered that the plaintiff should have execution against the goods, &c. of *B.* in the hands of *A.* But *A.* had, in 1806, removed to this state, where he had continued to reside, so that the execution was re-

THIS was an action of debt on a judgment obtained in the state of *Vermont*. From an authenticated copy of the record of the proceedings in *Vermont*, it appeared, that *Ramsdall*, in September, 1803, brought an action in the county court of *Addison* county, against *Seth Garlick*, as trustee of *Samuel Garlick*, an absconding or concealed debtor, for seventy-seven dollars and fifteen cents, of debt, on a judgment obtained by *Ramsdall* against *Samuel Garlick*, in March, 1803, alleging that *Seth Garlick* had in his possession money, goods, chattels, rights, and credits of *Samuel Garlick*, to the value of three hundred dollars; and the said *Seth Garlick* appeared, and being sworn and interrogated, answered that he gave a note to *Samuel Garlick* for six hundred dollars, which was still due, dated 1st November, 1802, payable in five years from the date, with interest; and the court therefore, adjudged that the said *Seth* had moneys of the said *Samuel* in his hands, to the amount of *six hundred dollars, payable on the 1st of November, 1807; and the said *Samuel* not appearing, the cause was, by order of the court, continued from term to term, until *August* term, 1807, when the plaintiff and the said *Seth* appeared, by their attorneys; but the said *Samuel* not of *A.* But *A.* had, in 1806, removed to this state, where he had continued to reside, so that the execution was returned unsatisfied; and the court thereupon granted a rule on *A.* to show cause why the plaintiff should not have execution against him, of his own proper goods, &c. which rule was served on *A.* in this state, being an inhabitant thereof; and he not appearing to show cause, a judgment was given against him, by the court in *Vermont*, for the whole of the debt, and execution awarded against his own estate. On this judgment against *A.* the plaintiff brought an action of debt in this state; and it was held, that to warrant the judgment against *A.* in his own person or property, there should have been a new suit against him, or a personal summons or notice, in the nature of a *scire facias*; and that the service of a rule to show cause upon him, in this state, being void, there was nothing to warrant the judgment, and that no action could be sustained upon it here. (a)

appearing, notice was ordered to be given to him to appear at the next term of the court in *February*, 1808, by publishing the declaration and copy of the order, for three weeks successively, in the gazette printed at *Middlebury*, in the county of *Addison*.

At the term of *February*, 1808, *Fenton* appeared and informed the court that *Ramsdall* had died, since the last continuance, and that he, the said *Fenton*, had been duly appointed his administrator, and prayed for leave to enter and prosecute the action as administrator, which was granted by the court. *Seth Garlick* also appeared, by attorney, and the plaintiff proved the service of the notice to *Samuel Garlick* to appear, by a due publication thereof, in the gazette, pursuant to the order of the court: and *Samuel Garlick* having been called, did not appear, but made default; on which the court gave judgment, that the plaintiff recover against the said *Samuel Garlick* his debt, and also his damages to twenty-three dollars and thirty-nine cents, and costs, taxed at thirty-two dollars and seventy-five cents; and the court not being advised as to the moneys of the said *Samuel*, in the hands of the said *Seth Garlick*, the cause was continued, without costs, to the said *Seth*, until *August* term, 1808, at which term the plaintiff and the said *Seth* appeared, by their attorneys; and it was ordered by the court that the plaintiff, administrator, &c. have his execution for his debt, damages and costs, against the goods and chattels of the said *Samuel*, in the hands of the said *Seth*, after the first of *November*, 1808. On this judgment a writ of execution was issued, in *February*, 1809, on which the sheriff returned, that he went to the usual place of abode of the said *Seth Garlick*, and made demand of the goods, &c. of the said *Samuel Garlick*, *on which to levy and satisfy the said execution, but no goods, &c. were shown, nor were any found by him in his precincts, &c. and therefore he returned the execution wholly unsatisfied.

The court thereupon, on motion of the plaintiff, granted a rule on the said *Seth Garlick* to appear at the next term and show cause, if any he had, why an execution should not issue on the said judgment against the said *Seth*, and his own proper goods, chattels and estate, &c.

At the next term, in *August*, 1809, the plaintiff appeared, and showed by affidavit, that the said rule had been duly served on the said *Seth Garlick*, who, being thereupon called, did not appear and show cause, &c. but made default; whereupon the said court adjudged that the plaintiff should recover of the said *Seth Garlick* the amount of the said judgment rendered against the said *Samuel*, being one hundred thirty-three dollars and twenty-nine cents, and also twelve dollars and ninety cents costs of suit, and that the

ALBANY
August, 1811.

FENTON
v.
GARLICK.

[* 196]

ALBANY,
August, 1811.

FENTON
v.
GARLICK.

plaintiff should have his execution against the said *Seth*, his own proper goods, chattels and estate, &c.

The cause was tried at the *Montgomery* circuit, in *October*, 1810, before Mr. Justice *Spencer*. It was proved, that the defendant, *Seth Garlick*, named in the record, had resided in this state since the year 1806, and that the rule to show cause mentioned in the record, on the affidavit of the service of which the judgment in *Vermont* was rendered against him, and his own estate, was served upon him in this state, in *June*, 1809, he being then an inhabitant of this state, and residing in the county of *Chenango*; though when the proceedings were commenced against him, as trustee of *Samuel Garlick*, he resided in *Vermont*.

A verdict was taken for the plaintiff, for one hundred and eighty-four dollars and eighty-four cents debt; and ten dollars and eighty-seven cents damages, subject to the opinion of this court on a case containing the above facts; and it was agreed, that if the court should be of opinion that the plaintiff was not entitled to recover, there should be a judgment of nonsuit.

[* 197]

The cause was submitted to the court without argument.

Per Curiam. This was an action of debt on a judgment obtained in *Vermont* against the defendant, as trustee of *Samuel Garlick*. The judgment was in the nature of one founded on the suggestion of a *devastavit* committed by the defendant, in the character of trustee, and against such a charge he was entitled to be heard. The mere fact of his having formerly had *assets* or moneys of *Samuel Garlick* in his hands, was not sufficient to authorise a judgment against his own property, in his individual capacity, until opportunity had been given to him to show in what manner he had disposed of those *assets*. This opportunity he has never had; for, at the time he was called upon to show cause, by a rule in the nature of a writ of *scire facias*, he resided in this state, and the service of that rule upon him, while within this state, (which fact was admitted,) was void, not only upon general principles, but by the express words of our statute, passed the 10th of *August*, 1798. (sess. 22, c. 3.) The judgment consequent upon such a service cannot be regarded by this court as the ground of a suit; nor will an action be sustained upon a judgment obtained in another state against an inhabitant of this state, without any personal summons or service of process. This was so decided in *Kilburn v. Woodworth*, (5 *Johns. Rep.* 37,) and in *Robinson v. Executors of Ward*. (*Ante*, 86.) The proceeding against the defendant, as trustee, in the year 1803, was not notice of any proceeding upon which this judgment was obtained, any more than a proceed-

ing, in the first instance, against an executor or administrator, would be sufficient to warrant a judgment founded on a *de-vestavit*. The original suit, in both cases, is rather a proceeding *in rem*, than *in personam*. It is against the *assets* in the hands of the executor or trustee, *belonging to the party whom they represent, and there must be a new suit, or a notice which is equivalent to it, before the trustee can be charged in his own private property or person, as for a breach of trust. There was no such new suit or notice to warrant the judgment in this case; and consequently, no action can be sustained upon it in this state. Agreeably to the stipulation of the parties, a judgment of nonsuit must be entered.

ALBANY,
August, 1811.

VAN SLYCK
v.
KIMBALL.

[*198]

Judgment of nonsuit.

VAN SLYCK *against* KIMBALL.

THIS was an action of covenant. The declaration stated that the defendant, by his deed, dated the 13th of *January*, 1807, covenanted with the plaintiff to indemnify and save him *harmless* from all demands, dues or damages whatsoever, which should or might happen or arise to him, for or on account of a *mortgage* executed by one *Julius Shaw* to one *John White*, for the whole of the western quarter of lot No. 41, in *Springfield*. The plaintiff averred that, at the time he was seized of the westerly half of the westerly quarter of the said lot, containing twenty-five acres, and that *White*, the mortgagee, on the 14th of *October*, 1809, under a power contained in the mortgage, sold the whole of the westerly quarter of the lot, including the lands owned by the plaintiff. That the plaintiff's title to the westerly half of the westerly quarter, was posterior, and subject to the mortgage, and so the plaintiff's title had been defeated and destroyed; and the defendant had not kept the plaintiff harmless, &c.

The defendant pleaded *non est factum*, and *non damnicatus*, after craving *oyer*, and concluded with a verification.

*The plaintiff replied, that he was seized in his own right, at the time of the covenant, and at the time of the sale under the mortgage, of the equal westerly half of the westerly quarter of the first lot, and that *White*, the mortgagee, sold as aforesaid, and that the title of the plaintiff was posterior to the mortgage, and subject to it, and so his title has been defeated, by reason whereof he had been *damnified*, and concluded to the country.

A. having sold and conveyed to B. a certain piece of land, covenanted with him to indemnify and save him harmless from all demands, dues and damages whatsoever, which might happen or arise to him, from a certain mortgage on the same land. It was held that this was tantamount to a covenant for quiet enjoyment against the mortgage; and that B. could not maintain an action for a breach of the covenant,

[*199]
without showing an eviction, under the mortgage. (a)

(a) See the cases collected in the notes to *Kent v. Welch*, 7 Johns. Rep. 258, and *Sedgwick v. Hollenback*, 7 Johns. Rep. 376.

ALBANY,
August, 1811.
VAN SLYCK
v.
KIMBALL.

To this *replication* there was a special *demurrer*; 1. Because the replication does not state with sufficient certainty how the plaintiff has been damaged; 2. Because no disturbance or eviction, in consequence of the sale, was alleged, nor that the plaintiff had been obliged to pay any moneys on account of such mortgage or sale; 3. Because there was a *departure* from the declaration.

Cady, in support of the demurrer. The plaintiff could not have been damaged by the mortgage in any manner but by an eviction, or by expending money on account of the mortgage. But he alleges no such damage. He merely states, that the mortgagee, by virtue of a power in the mortgage, sold the premises. This does not vary the situation of the plaintiff. He says, that in consequence of the sale, his title has been defeated and destroyed; but that it is a conclusion of law, not of fact; and a plea must consist of matters of fact, to be tried by a jury, not of matters of law. (1 *Chitty on Plead.* 519, 520.) *Eviction* is the only evidence of a title being destroyed. (Co. *Litt.* 345, b.) Title, as *Coke* defines it, is a lawful cause of entry into land, whereof another is seised. *Montague*, Chief Justice, says, "if one has a right or title to land, and, afterwards, comes into possession of the same land, his right or title is extinct or suspended in the land; for during the time that he has the land, it is not *in esse*; *ergo* during that time it cannot be termed a right or title." (Plowd. 88.) If then the plaintiff remains seised and possessed, his title cannot be affected, or his situation changed.

[* 200]

*The most the plaintiff can allege is, that his equity of redemption has been destroyed by the sale. But he alleges that he was well seised in his own right, &c. If so, then his equity of redemption has not been destroyed, and he has no legal cause of complaint.

The act concerning mortgages, (sess. 24. c. 156, s. 5,) speaks of a sale made in due form of law, under a power from the person having the equity of redemption. The power relates only to the equity of redemption; and the mortgagee must get possession of the legal estate, before he can exercise it. If the land be held adversely, the power of sale cannot be exercised. The relation of landlord and tenant does not exist; nor is there any privity of estate between the plaintiff and the mortgagee. (2 *Johns. Rep.* 84. 4 *Johns. Rep.* 215.) The plaintiff's title is adverse to that of the mortgagee.

A second mortgage or a judgment will prevent the exercise of the power of sale, to the prejudice of the second mortgagee or a subsequent judgment creditor. Why should not the rights of the second grantee be equally protected? The legislature did not think it necessary to provide especially for

such a case, since such grantee being in possession and holding adversely, a sale by the mortgagee could not prejudice or defeat his rights.

The power of sale contained in a mortgage is a power coupled with an interest. (1 *Caines' Cases in Error*, 15. *Bergen v. Bennet.*) The mortgagee has a vested estate in the land, and if he sells it, the purchaser must take it subject to the same rules as in the hands of the mortgagee. Again, there is a striking analogy between a devise of land to executors to be sold, and a mortgage of land with power to sell. Then suppose, before any sale by the executor, a third person should get possession, and hold adversely, could the executor sell?

[SPENCER, J. Your argument is founded on a *petitio principii*; you take it for granted that the grantee held *adversely to the *mortgagee*, when, in fact, he holds subject to the mortgage.]

[* 201]

The plaintiff, in his declaration, should have alleged that his estate was subject to the mortgage; but he alleges that he was seised in his own right. He ought also to have shown of what estate he was seised, and that he was seised at the time of sale by the mortgagee. The plaintiff, aware of this defect in his declaration, has made these allegations in his replication.

H. Bleecker, contra. It is objected that we do not show an eviction, nor that we have been obliged to pay money, by reason of the mortgage. But this is not an action on a covenant for quiet enjoyment; but on a covenant to indemnify and save harmless against a particular mortgage.

Such damages as necessarily result from the breach of the contract need not be stated in the declaration. (*Chitty on Pl.* 332. 7 *Vin. Ab.* 298. *Styles*, 458.) They will be ascertained at the trial.

The plaintiff has not pleaded a conclusion of law, but a fact. He alleges that the land has been sold under the mortgage, and the covenant is to indemnify him against it.

The nature of the estate of a mortgagor is well understood in this court. The mortgagor is the owner of the land. He is seised, and the land descends to his heirs. The mortgagee is not seised; he has only a pledge. Again, it is said that the right of the plaintiff has not been impaired, and that he has not been damaged. But he has been deprived of his legal title; his *justa causa possidendi*, without which he cannot expect to retain the possession of the land.

It is objected, also, that the plaintiff, in his declaration, has

ALBANY,
August, 1811.
VAN SLYCK
v.
KIMBALL.

ALBANY,
August, 1811.
CUMMING
v.
HACKLEY.

not stated the nature of his estate ; but he says he was seized of the premises, subject to the mortgage, *which is tantamount to an averment that he had the equity of redemption.

We contend that the replication is good ; but should the court think otherwise, then we object to the plea as bad. Where there is a covenant to indemnify against a certain thing, it is not sufficient to say *non damnificatus*, generally ; but the defendant must show how he indemnified. (5 *Mod.* 244. *Com. Dig. Pl.* 2 V. 13.)

Per Curiam. A covenant "to indemnify and save harmless from all demands, dues and damages whatsoever, which might happen or arise on account of a certain mortgage," is tantamount to a covenant for quiet enjoyment against the mortgage, and the plaintiff must show an eviction under the mortgage. The case comes within the principle of the decisions in *Waldron v. M' Carty*, (3 *Johns. Rep.* 471,) and of *Kortz v. Carpenter*. (5 *Johns. Rep.* 120.) Judgment must be rendered for the defendant.

CUMMING and CUMMING against HACKLEY and FISHER.

The mere giving a bond for the debt of another, is no payment, (a) and an action for money paid, laid out and expended for the use of the defendant, will not lie, unless the plaintiff has actually advanced money. (b)

[*203]

The giving a negotiable note may, in some cases, be equivalent to the payment of money ; but the giving a bond is not such payment. (c)

THIS was an action of *assumpsit*, for money paid by the plaintiff for the defendant. The cause was tried at the *New-York* sittings in *December*, 1809, before Mr. Justice *Yates*.

The plaintiffs and defendants in 1803 and 1804, were, respectively, partners in trade. On the 1st of *September*, 1803, the defendant *Hackley* made three promissory notes, amounting together to 1,556 dollars and 71 cents, in the partnership name of *Hackley & Fisher*, in favor of the plaintiffs, and for the purpose, as he alleged, of being endorsed by the plaintiffs to *N. Laurence*, in renewal of a note of the defendants for 1,527 dollars and 25 cents, held by *Laurence*. The two first notes were *endorsed by the plaintiffs to *William Adamson*, and by him to *Byrne & Smith*, and not being paid, the plaintiffs and *Adamson* were duly charged, and became liable as endorsors. The third note was endorsed by the plaintiffs to other persons, but was not produced at the trial.

The plaintiffs produced a note, dated 1st *Sept.* 1803, drawn by them in favor of the defendant for 1,527 dollars and 25 cents, which note *Laurence* received in payment of the original note held against the defendants, and at the same time made an additional advance to the defendants of 700

(a) *Acc. Campbell v. Jones*, 4. *Wend. Rep.* 306.

(b) *Vide Tuttle v. Mayo*, 7 *Johns. Rep.* 132. *Boardley v. Root*, 11 *Johns. Rep.* 464.

(c) *Vide Schermhorn v. Loines*, 7 *Johns. Rep.* 311. note (a).

dollars, upon another note of the plaintiffs for that sum, which last mentioned note was paid by the plaintiffs when it became due.

When the notes above mentioned were made, the defendants had stopped payment. The plaintiffs were in good credit, but stopped payment before the notes became due. A commission of bankruptcy issued against the plaintiffs the 14th *December*, 1803, and an assignment of their estate was executed the 18th *February*, 1804, and the certificate was obtained on the 3d *May*, 1804. *Laurence* proved the notes delivered to him by the plaintiffs, under the commission of bankruptcy against them. *Adamson* having paid the holders of the notes endorsed by him, brought an action against the plaintiffs, as makers; and *D. A. Cumming*, one of the plaintiffs, on the 15th of *April*, 1807, executed to *Adamson*, for the amount of the two notes, two bonds, the one payable in eighteen months, and the other in two years. These bonds have not been paid. The defendants were discharged under the insolvent act of this state, on the 28th *July*, 1804, and in the inventory of their estate, represented the above three notes as due by them, and endorsed by the plaintiffs, without mentioning the holders. The present suit was commenced after the payment of the two first notes, as above mentioned, and before either of the bonds was payable.

*On the 1st of *February*, 1808, *D. A. Cumming* assigned to a trustee, under a settlement before marriage, of the estate of his wife, the demand against the defendants on the three notes, with other property, of which notice was given by the trustee to the parties concerned. The plaintiffs, afterwards, in *December*, 1808, were discharged under the insolvent act of this state.

The judge charged the jury, that the bonds given by *D. A. Cumming*, amounted in law to a payment by the plaintiffs of the two first notes, and that such payment entitled them to maintain their action for the amount, with interest. But the jury found a verdict for the defendants.

A motion was made to set aside the verdict, and for a new trial.

D. B. Ogden, for the plaintiffs, contended, on the authority of the case of *Barclay and Proctor v. Gooch*, (*Esp. N. P. Cas. 571*), that the giving the bonds was a payment of the notes. In that case, Lord *Kenyon* held, that where a person gives a promissory note for the debt of another which the creditor accepts as payment, it is a payment of money to the party's use, and may be recovered as such.

That *D. A. Cumming* having given in the bonds in his own name, had a right to declare in what capacity, and on

ALBANY,
August, 1811.

CUMMING
v.
HACKLEY.

[* 204]

ALBANY,
August, 1811.

CUMMING
v.
HACKLEY.

[* 205]

what account, he gave them. *Quicquid solvitur, solvitur secundum modum solventis.*

Harris and *T. A. Emmet*, contra. The case of *Barclay and Procter v. Gooch*, was overruled in the case of *Taylor v. Higgins*, (3 *East*, 169,) in which it was decided, that giving a bond and warrant of attorney, for a former debt, would not support an affidavit of a cause of action, as *so much money paid* to the use of the defendant. In the case of *Nightingale v. Devisme*, (5 *Burr.* 2592,) it was urged that an *action for *money* had and received to the use of the plaintiff, would not lie for *stock*, as it is not *money*.

This is an action for *money paid* by the plaintiff to the use of the defendants, and the right of the plaintiff must be tested by the principles of that action. It is an *assumpsit*, raised by law, in consideration of a benefit done by the plaintiffs to the defendants. There must be *money paid*. It is not pretended that the plaintiffs have ever paid any money. They have merely given bonds, which are not, and never will be paid, for the plaintiffs are discharged under the insolvent law. Again, the money must be paid *by the plaintiffs*; but the bonds were given by *D. A. Cumming* only. A bond or payment by *A.* is not a bond or payment by *A.* and *B.*

In *Brand and another v. Boulcott*, (3 *Bos. and Pull.* 235,) it was held, that if two persons each paid money for another, they could not maintain a joint action, but must sue separately.

So if three persons join in a bond of indemnity, and two of them pay the whole money, they cannot join in an action of contribution against the third. (*Kelby and Vernon v. Steel.* 5 *Esp. Cas.* 193.)

Again, the money must be paid to the *use* of the plaintiffs; and to be for their use, it must be for their benefit; but the defendants could not be liable to *Adamson*, to whom the notes were given, for they were discharged.

Ogden, in reply. The endorser, *Adamson*, after the discharge of the defendants under the insolvent act, paid the notes, and had a good right of action against them, so that the defendants were benefited by giving the bonds in payment of the notes. If this is substantially, and in effect, a discharge of the notes, it is equivalent to a payment of so much money to the use of the defendants.

The case of *Taylor v. Higgins* is not an authority. It is grounded on a particular statute in *England* relative to affidavits to hold to bail.

Per Curiam. The plaintiffs sue in an action of *assumpsit* *for money paid for the defendants, and the question is, whether giving a bond in discharge of the liability of the plaintiffs, as endorsors of two negotiable notes drawn by the defendants, is to be considered as a payment of money.

As between the parties to the bond; it may be sufficient to discharge the simple contract debt, because it is changing the security to one of a higher nature. (6 *Johns. Rep.* 90. 2 *Johns. Cas.* 198. 5 *Tyng's Rep.* 26.) But is such a change of security the actual payment of money under this count? In *Taylor v. Higgins*, (3 *East*, 169,) the court of king's bench held it not to be equivalent to the payment of money, and not sufficient to entitle the party to recover under such a count. It seems to be a rule that under a count for money paid, it must appear that money was actually advanced. (*Spurrier v. Elderton*, 5 *Esp. N. P.* 1.) An obligation to pay is not the same thing as the actual payment. A bond has no analogy to cash. There are some cases in which the giving negotiable paper has been held equivalent to the payment of money, (2 *Esp. N. P.* 571. 5 *Tyng's Rep.* 299,) and there may be some reason for this distinction; for otherwise a party may be obliged to pay a debt twice, if the paper should pass into the hands of an innocent endorsee. But the case in *East* is directly in point, that the giving a bond is no payment.

The technical rule operates with perfect justice in this case; for the bond has not been and never will be paid, as the plaintiffs have since been discharged under the insolvent act; and if the money now demanded was to be recovered, their estate would receive it, without ever having given an equivalent.

The motion, on the part of the plaintiffs, to set aside the verdict, must therefore be denied.

Rule denied.

155

ALBANY,
August, 1811.
CUMMING
v.
HACKLEY

ALBANY,
August, 1811.

KAIN
v.
OSTRANDE.

***KAIN and others, Executors of RHEA, against
OSTRANDE.**

*It seems, that a special action on the case will not lie against a gaoler, at the suit of the sheriff for a negligent escape; but that the gaoler is answerable to the sheriff, only in an action of *assumpsit*, on his implied undertaking to serve the sheriff with diligence and fidelity.*

THIS was a special action on the case brought by the plaintiffs, as executors of *David Rhea*, deceased, late sheriff of the county of *Ulster*, against the defendant, as *gaoler*, for voluntarily suffering a prisoner, in custody, on a *ca. sa.* to escape.

The first count in the declaration stated, that on the 1st of *August*, 1801, one *McKenny* was arrested on a *ca. sa.* for 327 dollars and 33 cents, at the suit of one *Dodge*, by *Henry Sleght*, then sheriff of the county; and on the 4th of *December*, 1804, *McKenny* was assigned, with the other prisoners, by *Sleght* to *Rhea*, who had been appointed sheriff in his stead. On the 10th of *August*, 1805, *Rhea* appointed the defendant *gaoler*, who had the custody of the prison, and continued *gaoler*, until the 11th of *June*, 1807, and during that time the defendant, as *gaoler*, kept and detained *McKenny* in his custody in prison, in execution on the said suit, until the defendant, on the 22d of *August*, 1805, voluntarily permitted the said *McKenny* to escape.

The second count stated, that while the defendant was so *gaoler*, &c. and unmindful of his duty, &c. *McKenny* escaped without license, and against the will of the sheriff, *Rhea*, and without the license or will of the plaintiff in the execution, or any legal authority whatever. In consequence of which the testator, *Rhea*, as sheriff, was, by due course of law, obliged to pay a large sum of money, &c.

The declaration contained similar counts for the escape of other prisoners from the *gaol*, while in the custody of the defendant, as *gaoler*. The defendant pleaded the general issue.

* 208]

*The prisoners made their escape, by boring through the floor in a corner of the room in which they were confined, and having made a breach, which was concealed by a bed, they got into the cellar, and passed through several doors in the cellar, which were open, and ascended into the hall, and passed by a back door into the yard, and then effected their escape. The prisoners were employed eight days in making the hole in the room through which they got into the cellar. On the day of the escape the defendant was absent, at a place about 20 miles distant from the *gaol*, and it did not appear that he had examined the *gaol* during eight days previous to the escape; but one of the witnesses testified that

Rhea, the sheriff, had, during that time, repeatedly examined the gaol.

At the trial of the cause, at the *Ulster* circuit, in 1810, before Mr. Justice *Yates*, the plaintiffs were nonsuited.

A motion was made to set aside the nonsuit, and for a new trial. The points raised for the consideration of the court were; 1st. Whether if an action could be maintained by a sheriff against his gaoler, for a negligent escape, such action would survive to the executors of the sheriff?

2. Whether a sheriff can maintain this action against his gaoler for a negligent escape? If so, the fact as to such escape ought to have been left to the jury.

Hawkins, for the plaintiffs. 1. The executor represents the person of the testator, in regard to all his contracts, and can maintain such action as the testator could have done in his life-time. Even in regard to *torts*, it was held in *Hambley v. Trott*, (Coup. 173, 376. *T. Raym.* 71. *Dyer*, 271, 322,) that an action would lie against the executor, if property is acquired, or the estate is benefited. (a).

*The duty of the gaoler arises under an implied contract, for the breach of which an action lies, and which survives to the executor.

2. The sheriff is required, by statute, to appoint a gaoler. It is a hiring, and the gaoler is the servant of the sheriff. Upon every contract of hiring, there is an implied undertaking, on the part of the servant, that he will serve his master with diligence and fidelity; and if the master sustains any injury, by reason of the negligence or misconduct of his servant, the master may maintain an action against his servant which may be *assumpsit*, or on the *case*, in *tort*, to recover a compensation. (*Comyn on Contracts*, 226.) An escape from the gaoler is, by intendment of law, an escape from the sheriff, who is held responsible. A gaoler is like a common carrier, and is answerable for the safe keeping of the persons committed to his custody. (4 Co. 84, *Southcote's case*. 1 *Salk.* 18. See *Cameron v. Reynolds*, Coup. 403, 405. *Stewart v. Kip*, 5 *Johns. Rep.* 256, 258.) As to the fidelity and vigilance of the gaoler, that was a question of fact for the jury to decide; and there was sufficient evidence of negligence to let the cause go to a jury.

Sudam, contra. If an action of *tort*, for an escape, cannot be brought against the executor of a sheriff, it would seem to follow that the executor of a sheriff cannot maintain

ALBANY,
August, 1811.

KAIN
v.
OSTRANDER

[* 209]

(a) See *Franklin v. Low and Swartwout*, (*Johns. Rep.* 396, 404. Opinion of *Livingston*, J.) See also *Adair v. Shaw*, (1 *Sch. & Lef. Rep.* 264.) *Saville*, 240. *Cro. Car.* 39. 1 *Dick. Rep.* 215. 1 *Vesey*, 564.

ALBANY,
August, 1811.

KAIN
v.
OSTRANDER.

[*210]

an action of *tort* against the *gaoler* for an escape. This action is not founded on an implied *assumpsit*, but on a negligent escape.

In the cases which have been cited, the question was between the creditor or party in the suit, and the sheriff or gaoler. In *Cameron v. Reynolds*, it was settled, that an action for a breach of duty, in regard to the office of sheriff, must be brought against the *high sheriff*, and not against his deputy. The case of *Martyn v. Blithman* (*Yelv.* 197) is the only case to be found of an action against the *gaoler* for an escape, and that was on a commitment in execution to the *gaoler*, by the mayor of *Plymouth*. In the case *of *Baldry v. Johnson*, (*Cro. Eliz.* 349. See also 2 *Lev.* 159. 2 *Jones*, 62. 2 *Mod.* 124,) it was decided, that the plaintiff could not maintain an action against the *gaoler* for the escape of the debtor; (a) and the case of *Atterton v. Harward* shows that an action of *tort* will not lie by a sheriff against his *bailiff* for an escape. The sheriff is liable, as a *tortfeasor*, to the creditor; the present is an action by one *tortfeasor* against another *tortfeasor*.

The sheriff must take security from his deputies and gaoler; (*Bac. Abr. Sheriff*, (H.) s. 2 *Dalt. Sheriff*, 445. 2 *Keble*, 352. *Impey's Sheriff*, 509;) and his proper remedy is on the bond given for security. There can be no contribution between *tortfeasors*. There is no case to be found of an action on the case brought by a sheriff against his gaoler, for an escape.

But, independent of any question of law, the plaintiff was not entitled to recover, for there was no evidence of any culpable negligence on the part of the defendant. A gaoler is not to be responsible for a forcible breaking of the gaol, and a consequent escape.

Per Curiam. This is a motion to set aside the nonsuit directed at the circuit; but the principal question raised is, whether the suit can be sustained by the executors of the sheriff against his gaoler, for a breach of duty. This is a special action on the case sounding in *tort*. The point would more properly have arisen on demurrer, or on a motion in arrest of judgment. If, however, the court should perceive, that the action will not lie, that reason would be sufficient not to interfere and set aside the nonsuit, when the counsel have raised and argued the point.

When a deputy sheriff or gaoler commits a breach of duty, in regard to their trust, the usual course for the principal is

(a) In *Jones v. Hart*, (2 *Salk.* 441.) *Holt*, Ch. J. said, that an action on the case would lie against a *gaoler* for a *wilful* escape.

to resort to his bond of indemnity ; and if he has omitted to take one, it would seem from the case of *Atterton v. Harward*, (Cro. Eliz. 349. 1 Roll. Abr. 98. B. c. 1, and 2,) that the gaoler is only answerable in *assumpsit*, on his implied undertaking to serve the sheriff with diligence and fidelity. Here he is not charged upon any contract, express or implied, but as a *tortfeasor*, for a voluntary escape and a breach of duty, when, in judgment of law, the sheriff himself is equally guilty.

But it is not necessary to place the cause upon that ground, nor do the court mean to give any decided opinion upon that point ; because, admitting that the suit would lie, here was not the requisite evidence of a culpable negligence in the defendant, to justify a recovery against him ; and for that reason the motion is denied.

Motion denied.

ALBANY,
August, 1811

CASE
v.
POTTER.

CASE against POTTER, Administrator of POTTER.

IN error, on *certiorari*, from a justice's court. *Potter*, as administrator, brought an action against *Case*, before the justice, for ten dollars, money lent to him by the intestate in his life-time.

The cause was tried before a jury, and the plaintiff below produced the original book of accounts kept by the intestate, containing the original entry (in the hand-writing of the intestate) of ten dollars, lent to the defendant below, being a *Hudson* bank note. The defendant objected to the evidence, as conclusive proof of the money lent. The justice decided, that it was not conclusive, nor, of itself, sufficient evidence to entitle the plaintiff to recover ; but that the jury might consider it in connection with other circumstances.

The plaintiff below then proved, by a witness, that *Case* applied to the witness for the payment of a debt due from him to *Case*, who said he *must have ten dollars* to make up a sum he wanted ; that the witness applied to the intestate, who was present, for the loan of a small sum *of money, and the intestate handed to him a *Hudson* bank note of ten dollars ; but some difference arising between the witness and *Case*, as to the amount due to the latter, the witness did not pay him any thing, but returned the bank note to the intestate (sale and delivery of goods) be admitted in connection with other circumstances as evidence to the jury. (a)

(a) *Acc. Pittsburgh v. Thayer*, 12 Johns. Rep. 461.

In an action by an administrator, for money lent, the book of account containing the original entries in the hand-writing of the intestate, is not admissible evidence for the plaintiff.

But, it seems, the regular entries of a party in his books, made in the usual course of his business, though not admissible alone, or as conclusive evidence, may (in considera-

[* 212]
tion of usage, which may have crept in, or the difficulty of proof in many cases of the

cases of the

ALBANY,
August, 1811.

Case
v.
Porter.

testate; and the witness, a few minutes afterwards, saw in the possession of *Case*, a *Hudson* bank note, which he verily believed to be the same note which the witness had just before returned to the intestate.

The fair character of the intestate was also proved, and that he was in the practice of lending small sums of money. The jury found a verdict for the plaintiff.

On this statement of facts, the cause was submitted to the court, without argument.

Per Curiam. The parol proof was sufficient to warrant the verdict in the court below. The party did not object to the admission of the book of entries of the intestate, but only to the conclusive effect of the book. How far the private entry of the party himself, in his favor, be admissible, as evidence for him, in support of a charge, is a question not necessarily arising in this case. Such entries have been held admissible, when against the interest of the party making them. (7 *East*, 290. 10 *East*, 109. 1 *Campb. N. P.* 367.) But the general rule of the *English* law is to deny the legality of such entries as proof, when in favor of the party, even in the case of a regular tradesman's books. (2 *Salk.* 690. *Buller's N. P.* 282.) No inference can be drawn from the provision in the statute of 7 *Jac. I.* that tradesmen's books were evidence within the year; for Lord *Holt*, in the case in *Salk.* repels any such inference; and *Barrington*, in his *Observations upon the Statutes*, (p. 399,) says, that the statute of *James*, in this particular, "shows very great ignorance of the common law." In other countries in which such evidence, of the party's own fabrication, is admitted, it requires the suppletory oath of the party, to give it effect. *(*Pothier, Traite des Oblig.* No. 719, 833. 2 *Tyng's Rep.* 217.) If such proof is to be tolerated at all with us, owing to the usage which may have crept in, and the difficulty, in many cases, of giving proof of a sale and delivery, it can never apply to a charge for cash lent, but only to the regular entries of the party, in the usual course of his business; and even then, it cannot receive greater indulgence than what was granted to it by the magistrate in this case, for we have no authority to require or admit the oath of the party. All that the justice ruled upon the trial in this case, was, that the book was not conclusive, nor, of itself, sufficient evidence to entitle the plaintiff to recover, but that the jury might consider it in connection with other circumstances. As the demand was for cash lent, the book would have been inadmissible, if objected to at the time, and without it the evidence was sufficient. Judgment must therefore be affirmed.

[* 213]

ALBANY,
August, 1811.
WATKINSON
v.
LAUGHTON.

WATKINSON *against* LAUGHTON.

THIS was an action of *assumpsit*, on a bill of lading, signed by the defendant, as master of a ship. The cause was tried at the sittings in *New-York*, before the *Chief Justice*.

The goods were shipped at *Liverpool*, in good order, consigned to the plaintiff. On the arrival of the ship in *New-York*, it was found that several of the trunks had been opened, and the goods taken out; and it was admitted that the goods had been embezzled, or otherwise lost, without any fraud on the part of the defendant.

The plaintiff proved the amount of the goods deficient, and the price at which he sold such part of the same kind of goods as were delivered; and claimed to recover the value * of the goods deficient at that price, with interest from the time when they ought to have been delivered.

The counsel for the defendant objected to this rule of damages, and contended that the plaintiff was entitled to recover no more than the *invoice cost* of the goods, without interest. A verdict was taken for the plaintiff, by consent, for one thousand five hundred and seven dollars and sixteen cents, subject to the opinion of the court; and it was agreed that if the court should be of opinion that the plaintiff was entitled to recover the value of the goods at the *port of delivery*, ascertained as above mentioned, with interest, then the verdict was to stand, and judgment be given thereon for the plaintiff; if the court should be of opinion that the plaintiff was not entitled to interest, the verdict was to be reduced to one thousand three hundred and seventy-nine dollars. But if the court should be of opinion that the plaintiff was entitled to recover the *invoice cost* of the goods only, with interest, the verdict was to be reduced to one thousand fourteen dollars and seventy-one cents. But if the court should consider the plaintiff entitled to the *invoice cost* only, without interest, the verdict was to be reduced to nine hundred nineteen dollars and thirty-three cents.

Metcalf, for the plaintiff. We contend that the plaintiff is entitled to recover the value of the goods at the port of delivery, with interest. The master of a ship is considered as a common carrier, and is responsible as such. (*Molloy*, b. 2, c. 2, s. 2. *Abb. on Ship.* part 3, c. 3, s. 1.) We find no precise rule of damages in a case like the present, laid down in the *English* books. All the writers (*Abb. on Ship.* part 3, c. 3, s. 10. *Molloy*, b. 2, c. 2, s. 14. *French Ord.* liv.

(*) *Vide Aymar v. Astor*, 6 *Coven.*, 266.

ALBANY,
August, 1811.
~~~~~  
WATKINSON  
v.  
LAUGHTON.

[\* 215 ]

3, tit. 3. *Fret. art. 14. Pothier, Chart. Part. No. 33, 34 Malyne's Lex. Mer.* p. 2, c. 22) on maritime law agree, that if a master, compelled to take refuge in a foreign port, is under the necessity of selling some part of the cargo, to raise money to defray the expense of repairs, and the ship arrive at her place of destination, the merchant is entitled to receive the value of the goods at the port of delivery. And *Pothier* (Ch. Part. 35) lays down the rule generally, that the master is bound to pay the freighter, for such goods as are missing, not only the cost of the goods, but the profit \*that might have been made upon them, at the port of destination ; that is, at the same rate goods of the same kind and quality sell for, at the port of delivery. All the authorities on this subject proceed on the ground of a complete indemnity to the owner of the goods ; which can be effected only by taking the value of the goods at the port of destination, with interest, deducting freight and charges.

*Griffin* and *T. A. Emmet*, contra. The defendant has been guilty of no fraud or misconduct, in this case ; and, if liable, it must be on the strict rule of law. Why should he be put in a worse situation than an insurer ? If liable as a common carrier, the case of the master and an insurer are analogous. The object, in both cases, is to afford a complete indemnity ; and the rule of damages in both must be the same. Now, in cases of insurance, the rule of indemnity is settled to be the *invoice* price of the goods, with interest. This is the proper and most convenient rule. The market price of the goods at the port of delivery is always fluctuating and uncertain. The invoice price is fixed and known, and affords a perfect indemnity.

But we contend that the rule of damages has been settled by the decision of the court in the case of *Smith & Delamater v. Richardson*, (3 *Caines*, 219,) to be the cost or value at the port of shipment, without regard to the market price at the port of delivery.

[*SPENCER, J.* But that was an action to recover damages for a breach of contract, in wholly neglecting to carry. The policy of the law, in cases like the present, in making the master liable, is to induce him to employ honest men in his service.]

[\* 216 ]

This is an action of *assumpsit* on the contract to carry, and we see no difference between an entire failure to perform, \*and a failure to deliver, after a commencement of the performance. The principle laid down in the case of *Smith & 162*

*Delamater v. Richardson*, applies to the present case, and is conclusive.

ALBANY,  
August, 1811.  
WATKINSON  
v.  
LAUGHTON

*Per Curiam.* The rule of damages in such a case as the present, does not appear to have been the subject of discussion and decision in any of the numerous commercial cases which have arisen in the *English* courts. Perhaps the rule has been so well understood and settled in practice, as not to be drawn into controversy. But as that practice is not stated in the case, nor known to the court, we must govern ourselves by the general principles which are established in the books. The case, in this court, of *Smith & Delamater v. Richardson*, (3 *Caines*, 219,) is not applicable, as that was not a case of loss, arising from the fraud, negligence or misfortune of the carrier, in the performance of his trust, for the defendant there never entered on the undertaking, and the suit was for a breach of contract in not carrying, and the plaintiffs, afterwards, became their own carriers, and lost the goods. There may then be a very material difference between the two cases, as to the reason and policy of the rule of damages. Here was an embezzlement of part of the goods, in the course of the voyage, and it would seem to be the rule of the marine law in such cases, that the master must answer for the value of the goods missing, according to the clear, net value of goods of like quality, at the place of destination. All the ordinances and authorities declare this to be the rule, when the goods are sold by the master, from necessity, in the course of the voyage; (*Abb. on Ship.* part 3, c. 3, s. 10;) and why should not the same rule apply when the goods are missing by any other means? The general doctrine is, that the master must make good the loss or damage accruing to the goods which he undertook to carry safely, for hire; and *Pothier* (*Charter Partie*, No. 33, 35) says that the rule is general, \*and applies to all cases in which the master is responsible for missing goods. This is a sufficient authority for the rule, if there be no adjudged case or settled practice, (and we know of none,) to the contrary; especially, as the rule is in furtherance of the general policy of the marine law, which holds the master responsible, as a common carrier, for accidents, and all causes of loss, not coming within the exception in the bill of lading. It takes away all temptation to withhold a delivery of the goods, and exempts the shipper from the hard task of undertaking to detect, in every case, the negligence, fault or fraud of the carrier; and it must be admitted that the rule would be highly just and necessary, if the loss was imputable to either of those causes.

The question of interest depends upon circumstances.  
The jury may give interest, by way of damages, in cases in

[\*217]

ALBANY,  
August, 1811.

MORRELL  
v.  
FULLER.

which the conduct of the master was improper. But here, no bad conduct is to be imputed to him, and interest is not, in every case, and of course, recoverable, because the amount of the loss is unliquidated, and sounds in damages, to be assessed by the jury.

The verdict is, therefore, to be reduced, not only to the sum of one thousand three hundred and seventy-nine dollars, but the sum must be further reduced, if necessary, to the net, instead of the gross, value, at the port of delivery. It would seem by the case, as we understand it, that the highest sum found was the gross price of the goods, but the plaintiff ought to deduct the charges for freight, &c. which he would have paid had the goods arrived, and take only the net price, without interest.

Judgment accordingly.

[\* 218]

*\*MORRELL, qui tam, against FULLER.*

In an action by a common-informer, on the 2d section of the act to prevent usury, (sess. 10. c. 13.) the plaintiff must declare specially, and state the usury, &c. The general form of declaring mentioned in the act, is given only to the bor-rower.

THIS was an action of debt, brought by the plaintiff, as a common informer, on the second section of the *act for preventing usury.* (sess. 10. c. 13. [1 R. S. 772. sec. 3, 4.])

The declaration was as follows:

*Albany* county, to wit: *John Morrell*, who sues as well for the poor of the city of *Schenectady*, as for himself, complains of *Jeremiah Fuller*, in custody, &c. of a plea, that he render to him, the said *John*, and to the said poor, ninety-two dollars, eight cents and five mills, of lawful money of the state of *New-York*, which he owes to and unjustly detains from them; for that whereas the said *Jeremiah Fuller*, after the eighth of *February*, 1787, to wit, on the sixth of *August*, 1808, was indebted to one *Thomas Morrell*, now deceased, in the sum of ninety-two dollars, eight cents and five mills, whereby an action had accrued to the said *Thomas Morrell*, by force of and according to the statute in such case made and provided, entitled, an act for preventing usury, passed the eighth *February*, 1787, to demand and have of the said *Jeremiah*, the said sum of ninety-two dollars, eight cents and five mills, of lawful money as aforesaid; and the said *John* avers, that neither he the said *Thomas*, or his executors or administrators, hath not, nor hath either of them, within one year after the said sixth of *August*, 1808, in any wise prosecuted the said *Jeremiah* for the recovery of the said sum of ninety-two dollars, eight cents and five mills, and so the said

*John Morrell*, who sues as well, &c. says, that the said *Jeremiah*, on the ninth day of *August*, in the year of our Lord one thousand eight hundred and nine, at the city of *Albany* aforesaid, in the county of *Albany* aforesaid, was indebted to the said *John Morrell*, and to the said poor, in the said sum of ninety-two dollars, eight cents and five mills, of lawful \*money as aforesaid, whereby an action hath accrued to the said *John Morrell*, who sues as aforesaid, to demand and have of the said *Jeremiah Fuller*, for himself and the poor of the city aforesaid, the said sum of ninety-two dollars, eight cents and five mills, of lawful money as aforesaid, according to the form of the act aforesaid, entitled, an act for preventing usury; yet the said *Jeremiah*, although often requested, &c.

A verdict having been found for the plaintiff, a motion was made in arrest of judgment.

The same cause was before the court in *February* term last; (see vol. 7, p. 402;) but the point on which it was now decided was not then considered by the court.

*J. B. Yates*, for the defendant, contended, that the provisions of the statute, as to the manner of declaring, was confined to the person who had paid the money, and is not given to the common informer, in the second section; but that a common informer must state the usury or special matter, in his declaration.

*Foot*, contra, insisted, that the words in the second section, "sue for and recover the same in *manner* aforesaid," referred to all the previous matters in the same section, as to the mode of suing, &c.

*Per Curiam.* The statute of usury does not exempt the common informer from the necessity of declaring specially, and stating the usury. The words are too general to justify him in stating the original grounds of the indebtedness of the defendant, in the same loose and general terms, as when the party aggrieved sues. The borrower has express authority for departing from the general rule in declaring, but it would not be proper to extend to the informer such indulgence, because of some equivocal words in the statute, which do not require that construction. What was said by the court in *Cole v. Smith*, \*(4 *Johns. Rep.* 193,) and again, in this very case, (7 *Johns. Rep.* 402,) is to this effect. The original offence must be specially set forth, so that the defendant may be apprized of it, and prepared to meet it. The motion in arrest of judgment must, therefore, be granted.

ALBANY,  
August, 1811.

MORRELL  
v.  
FULLER.

[ \* 219 ]

[ \* 220 ]

ALBANY,  
August, 1811.

WICKHAM.

v.

COCKLIN.

An action for  
maintenance  
will not lie a-  
gainst a person  
for carrying on  
a suit in the  
name of another,  
or assisting  
in its prosecu-  
tion, if he has  
any legal or e-  
quitable inter-  
est in the land  
or subject of  
controversy. (a)

If the plaintiff  
seeks to avoid  
a deed on the  
ground of an  
adverse posses-  
sion, at the time  
of its execution,  
such adverse  
possession must  
be clearly made  
out by positive  
facts, and not  
be left to infer-  
ence or conjecture. (b)

Though a per-  
son purchases a  
pretended title,  
and prosecutes  
a suit in the  
name of another,  
but for his  
own benefit;  
yet he is not  
[\* 221]  
liable to an ac-  
tion for main-  
tenance under  
the 9th section  
of the act to  
punish champ-  
erty and main-  
tenance. (Sess.  
24. c. 87.)

WICKHAM, *qui tam*, &c. against CONKLIN.

THIS was a *qui tam* action, for one thousand dollars, of debt, to recover four penalties, of two hundred and fifty dollars each, on the *act to punish champerty and maintenance*. (sess. 24. c. 87. [2. R. S. 691. sec. 5, 6.])

The declaration contained four counts. The first count stated, that by the act, (sect. 1,) "no officer or other person should (shall) take upon him any business that was (is) or might (may) be in suit in any court, *for to have part of the thing in plea or demand*, and no person, upon any such agreement, should (shall) give up his right to another, and every such conveyance and agreement should be void. And every such person who should (shall) maintain any plea or suit in court, for lands, tenements, or other things, for to have part or profit thereof, should be punished, by fine or imprisonment; but (that) this act should (shall) not prohibit any person to have counsel, of persons duly licensed for that purpose, or to take counsel of his parents or (and) next friends." And "that (sect. 9) no person should (shall) thereafter *unlawfully main- tain, or cause or procure any unlawful maintenance*, in any matter or cause whatsoever, in suit and variance, concerning any lands, tenements or hereditaments, or any goods, chattels, debts, damages, or offences in any court in this state, or before any person who should (shall) have authority to hear or determine respecting the same; and *that* no person should (shall) unlawfully *retain for maintenance of any suit or plea, any person*, or embrace any freeholder or jurors, by rewards, \*promises, or other sinister labor or means, to maintain any matter or cause, or to the hindrance or disturbance of justice, or to the procurement or occasion of any false verdict, in any court within this state, upon pain to forfeit, for every such offence, two hundred and fifty dollars; the one moiety there- of to the use of the people, and the other moiety to him who will sue for the same, by action of debt," &c. The plaintiff then stated that the defendant, on the first of September, 1808, *did unlawfully maintain a certain matter or cause* in suit and variance, concerning certain lands situate in *Tully*, in *Onondaga* county, wherein *J. Jackson* was plaintiff, and *Jether Bailey* defendant, and then was and still is depending in the Supreme Court, contrary to the act, &c. whereby an action hath accrued, &c.

(a) *Vide Thalman v. Brinkerhoff*, 20 Johns. Rep. 386 S. C. 3 Cowen, 623. *Campbell v. Jones*, 4 Wendell, 366.

(b) *See Teale, qui tam, v. Fonda*, 7 Johns. Rep. 251, and the cases cited in the note thereto. *See also Jackson v. Sharp*, 9 Johns. Rep. 163. *Jackson v. Waters*, 12 Johns. Rep. 368.

The second count was like the first.

The third count was like the second, except that the suit was stated to be by *James Jackson* against *Elias Davis*.

The fourth count was like the third.

The cause was tried at the *Orange* circuit, in *September*, 1810, before Mr. Justice *Van Ness*. At the trial, the plaintiff proved, that the writ in this cause was issued the 6th of *June*, 1809, and offered to prove, that on the 12th of *June*, 1806, the defendant and one *Benjamin Herrick*, had taken a deed of a lot in the military tract, knowing that certain persons were then in possession holding adversely. The proof was objected to, but admitted. The plaintiffs then proved, that in *June*, 1806, the defendant and *B. Herrick* asked *Charles A. Tucker* to sell a military lot; that *Tucker* told them he had sold the right, when a minor, and that he gave the deed in 1792, and that he was born the 10th of *August*, 1772. That the defendant and *B. H.* offered him 50 dollars; that they paid him 5 dollars, which he was to retain, in every event, and gave him a bond for the residue; \*that the deed was drawn in the name of *William D. Williams*, and that they and *Williams* were jointly interested. The papers mentioned by the witness, though objected to, were read in evidence. The bond was dated *June* 12, 1806, for 45 dollars, and conditioned to be good, if the defendant and *B. Herrick* obtained the lot granted to *John Tucker*, a soldier, (brother to *Charles A. Tucker*.) The other writing, which they gave to *C. A. Tucker*, was of the same date, and certified that they were to be at all the expense in procuring the lot.

The *deed*, which was of the same date, and for the consideration of love and affection, and also of 300 dollars, contained a covenant only, that *C. A. Tucker* was heir to *John Tucker*. It was further proved, that the defendant and *B. H.* said, at the time, that there was some person on the lot, and that there would be a great deal of trouble about it. *C. A. Tucker*, in the summer of 1808, executed a deed of the lot to the plaintiff, who gave him 100 dollars, and an indemnity against former deeds.

The plaintiffs then gave in evidence a patent of lot No. 14, in *Sempronius*, granted to *John Tucker*, and offered in evidence a declaration in ejectment in this court by *James Jackson*, ex dem. *John Tucker, Charles A. Tucker, William D. Williams and others v. Elias Davis*. Another declaration of *James Jackson*, on the demise of the same lessors, against *Jether Bailey*, both of which were of *November* term, 1806.

The plaintiff further proved, that *William Wickham* (father of the plaintiff) was attorney for *Bailey* and *Davis*, in

ALBANY,  
August, 1811.  
WICKHAM  
V.  
CONKLIN

[ \* 222 ]

ALBANY,  
August, 1811.

WICKHAM  
v.  
CONKLIN.

[ \* 223 ]

the ejectment suits, in 1807 and 1808; and that the suits were noticed for trial, at the *September* circuit, in 1808, in *Onondaga*. That the causes were called on for trial, by the judge at the circuit; that *Bailey* and *Davis* were in possession in 1808, and claimed to be owners under the plaintiff.

The counsel for the defendant moved for a nonsuit, on the following grounds: 1. Because the plaintiff had \*proved *champerty*, and not maintenance; 2. That the defendant appeared to be an equitable owner with *Herrick* and *Williams*; and it was not *maintenance* to prosecute an action in the name of *Williams*, his trustee; 3. That there was no evidence that *Bailey* and *Davis* held under color of title. The motion for a nonsuit was overruled by the judge.

The defendant proved, that in *July* or *August*, 1808, *Jeremiah Conklin* went, at the request of *B. Herrick*, to *Charles A. Tucker*, for a warrant of attorney to prosecute the ejectment suit; that *Tucker* told him he had never sold his right, until he sold it to *W. D. Williams*, and said he did not know where the land lay, nor of any person in possession; that *Tucker* refused to give a power of attorney, and said he had given a deed to the plaintiff. The defendant proved that *Herrick*, *Williams* and himself, were jointly interested in the land, and prosecuted the ejectment suits, at their joint expense.

The judge charged the jury, that it was a material point, whether at the time the defendant and *Herrick* made the contract with *Tucker*, there was any person in possession of the land claiming adversely, and whether the defendant knew it; that it was proved that *Bailey* and *Davis* were in possession, and had cleared a part, and that the jury might, from circumstances, presume they held adversely, under color of title, though no deed was shown under which they held, and that the defendant knew it; that there were several circumstances to show that defendant knew he was buying a lawsuit; that the prosecution of a suit by *Conklin* and others, for their own benefit, was lawful, and the deed was good; but that as *Charles A. Tucker* was a lessor, it was maintenance if the land was held, at the time, adversely; that he thought the proof strong and conclusive, and recommended a verdict for the plaintiff. The jury found a verdict for the plaintiff, for 500 dollars.

[ \* 224 ]

\*A motion was made to set aside the verdict and for a new trial; 1. Because improper evidence was admitted; 2. Because the plaintiff ought to have been nonsuited at the trial; 3. For the misdirection of the judge.

*Ruggles*, for the defendant. 1. There is a variance in the declaration from the statute, in using the word "should,"

instead of *shall*; and in reciting the 9th section, the word "that" is introduced, where it is not to be found in the section. When a person undertakes to set forth a public act, the least misrecital is fatal. (*Doug.* 94. 97. 1 *Ld. Raym.* 381. 7 *Term Rep.* 771. *Chitty Pl.* 217, 218.)

ALBANY,  
August, 1811.  
WICKHAM  
v.  
CONKLIN.

2. The action is brought on the 9th section of the act to recover the penalty; but the verdict is founded on the 8th section, which is against the buying and selling of *pretended titles*, and the offender forfeits the value of the land. The 9th section prohibits *maintenance*, and gives the penalty of 250 dollars, for every offence. If, therefore, the plaintiff cannot bring this case within the *ninth* section, he cannot recover. This section is copied from the *English* statute, and the decisions of the *English* courts are in point.

*Maintenance* is defined to be an officious intermeddling in a suit that does not belong to one, by maintaining or assisting either party with money, or otherwise, to prosecute or defend it. (4 *Bl. Comm.* 134. *Hawk. P. C.* b. 1. c. 83. s. 1. 12.) There is a great difference between *purchasing a pretended title*, and *maintenance*. If the party buys a pretended title, he forfeits the value of the land. If he upholds the suit of another, he forfeits 250 dollars. As the plaintiff sues for the penalty of 250 dollars, the offence charged, if any, must be *maintenance*. In an action for maintenance, the plaintiff must show that a plea was pending, (*Savil*, 41, 42,) and the defendant may plead *nul tiel record*. (*Hawk.* b. 1. c. 85. s. 42.)

Again, it is stated in the declaration to have been an action by *James Jackson v. Jether Bailey*; but it is not stated for what precise thing the suit was brought. *Jackson* is a fictitious person, and the lessors are not named. \*The description of the suit is insufficient; and the plaintiff, on that ground, ought to have been nonsuited. As to the purchase of the pretended title, it was more than a year before the commencement of this suit, and will not, therefore, support an action.

[ \* 225 ]

3. The evidence of adverse possession was not sufficient. To render a deed void on this ground, there should be clear and satisfactory evidence of an adverse possession at the time. A person who has an interest in land, certain or contingent, legal or equitable, may lawfully uphold another in an action concerning such lands. (*Hawk. P. C.* b. 1, c. 83, s. 17, 18, 21, 22. 2 *Roll. Abr.* 115, 117, 118. *Bac. Abr. Maint.* (B.) To constitute the offence of *maintenance*, there must be an intermeddling by the party in a suit where he has no concern or interest in the subject matter of controversy. The suits in the present case, were certainly for the interest and benefit of the defendant.

ALBANY,  
August, 1811.

WICKHAM  
v.  
COX, &c.

Again, how can an action for *maintenance* be supported while the suit, the bringing of which is alleged to be *maintenance*, is still pending? How can the court say, but that the plaintiff in that suit may recover, and so establish the title of the present defendant?

*J. Duer* and *Bunner*, contra. 1. Using the word *should*, instead of *shall*, or the *past*, instead of the *present* tense, cannot be a fatal variance, in reciting a statute. In *Boyce v. Whitaker*, (Doug. 94,) the statute was so recited; but no objection was made on that account. In *King v. Hall*, (1 Term Rep. 320,) which was a conviction on an information, the court said, that it was better to state it in the time *past*, than in the *present* tense. (1 Saund. 262.) In *Partridge v. Strange*, (Plowd. 78,) the act is recited in the same manner. The rule laid down by Lord *Mansfield*, in *Boyce v. Whitaker*, that in reciting an act of parliament, the party was to be held to half a letter, is unreasonable, and contrary to former decisions. The true rule is laid down in *Ventris*, (2 Vent. 215, 2 Bulst. 47,) that \*where the recital answers the *sense* of the statute, it is sufficient.

In *Say and Seale v. Stephens*, (Cro. Car. 136,) the court held that a misrecital, to be fatal, must be in the *substantial* part of the act. *And for or*, has been held not to be a fatal variance. (Cro. Eliz. 307.) It is true, in *King v. Marsack*, (6 Term Rep. 71,) it was held otherwise, but on the ground that the variance, in that case, changed the *sense* of the statute.

But the plaintiff does not profess to set out the statute *verbatim*, but only the substance of it.

2. This action is not brought against the defendant for purchasing a pretended title, but for *maintenance*. The evidence, as to the pretended title, was introduced to show that the plaintiff had no title, legal or equitable.

The statute creates no new offence; it merely superadds a penalty. The offence mentioned in the first section is properly *champerty*, a species of *maintenance*. Our act is not borrowed from any one *English* statute, but is taken from several statutes. The 1st section is from 1 *West.* c. 5, and the 9th section from 32 *Hen.* VIII. c. 69.

We must look to the common law for a definition of *maintenance*. It is where one person assists another with money to carry on a cause. (Hawk. b. 1. c. 83, s. 4. 1 Inst. 368. b. 369. a.) The evidence shows that the defendant purchased the title with a view to the suit; and it is manifest he was aware, at the time, of an adverse claim.

3. Then, had the defendant any interest in the land which could justify him in upholding the suit? There can be no  
170

doubt, from the evidence, that the purchase was of a pretended title. An adverse possession is where the person in possession claims title, and the declarations of the tenant are admissible evidence. (1 *Johns. Rep.* 163.) If there was an adverse possession, the deed was absolutely void; for where the law declares a thing unlawful, if done, it avoids it when done. It was so decided by this court in *Jackson, ex dem. Jones v. Brinckerhoff*, (cited 5 *Johns. Rep.* 500,) which was recognised in *Williams v. Jackson*.

\*It is said that the suit was for the benefit and interest of the defendant. But the prosecution of a suit, after the purchase of a pretended title, though for the benefit of the purchaser, is maintenance. It was so decided in *Flower's* case, which is precisely in point. (Hobb. 115. Moore, 761. Noy, 52.) The same objection which has been made here, was made in that case; but the Court of *Starchamber* held it to be *maintenance*.

There could be no *trust* in this case, for if the purchase was illegal and void, it could raise no trust or interest for the defendant. If there was any agreement between the defendant and *Williams*, as to the suit, it was *champerty*.

*Per Curiam.* The ground of the action consists in the charge of unlawful maintenance, in carrying on the ejectment suits. But if the defendant had any interest, legal or equitable, in the land, which was the object of the suits, there was no foundation for the charge of maintenance. (2 *Roll. Abr.* 115. g. 117. *Hawk. tit. maintenance*, s. 12, 13. 17, 18.) The defendant and *Herrick* purchased of *Charles A. Tucker*, his interest, as heir to his brother *John*, in the military bounty lands, and took a deed, regularly drawn and executed, and paid 5 dollars down, and gave a bond for 45 dollars, to be paid, on condition that the title, so granted, prevailed. This deed was taken in the name of *W. D. Williams*, but on their joint account. The defendant had then an equitable interest in the land, and if any interest passed, *Williams* took it as trustee for the joint concern. This deed was given in *June*, 1806, and it was valid and operative, unless the land to which it related was held at the time adversely. It was incumbent upon the plaintiff to make out this fact affirmatively and clearly, if he meant to destroy the operation of the deed on that ground. There is certainly no sufficient evidence of the existence of that fact at the date of the deed. There is no evidence that \**Bailey* and *Davis* were on the land as early as *June*, 1806. They were, afterwards, in possession, and held under the plaintiff; but the plaintiff's deed from *Tucker* was as late as 1808, and he did not show any other source of title. There were some loose sayings, that

ALBANY,  
August, 1811.

WICKHAM  
v.  
CONNLIN.

[ \* 227 ]

[ \* 228 ]

ALBANY,  
August, 1811.

WICKHAM  
v.  
CONKLIN.

some person was on the land when the deed was taken, but who it was, or under what claim or title, did not appear. It will not do to declare a deed void, upon such light and equivocal testimony of adverse possession. The adverse possession ought to have been made out, by positive facts, and not by mere inference or conjecture.

If the deed of *June*, 1806, was not absolutely void, then the charge of maintenance falls to the ground, and the plaintiff ought to have been nonsuited, in pursuance of the motion made at the circuit.

But if the deed did not operate, by reason of the adverse possession, yet the testimony does not make out the crime of maintenance, in the strict legal sense. The defendant did not officially intermeddle in the prosecution of another's right, but he was undoubtedly prosecuting this suit for his own benefit. He may have purchased a pretended title, *scienter*, so as to have subjected himself to the penalty given in the 8th section of the statute, but that is not the offence charged. Maintenance, strictly speaking, is the assisting another person in a lawsuit, without having any privity or concern in the subject. There can be no doubt that the defendant was using the name of *Tucker*, as a mere nominal lessor, not for the benefit of *Tucker*, but as a trustee for his own benefit, and that of the other persons connected with him in the purchase. In no view of the case, then, does the charge appear to be made out; and, without attending to other objections which were made upon the argument, there must be judgment of nonsuit entered, according to a stipulation in the case.

Judgment of nonsuit.

ALBANY,  
August, 1811.  
KANE

\*KANE and KANE against THE COMMERCIAL INSURANCE COMPANY OF NEW-YORK. Com. Ins. Co.

THIS was an action on a policy of insurance "upon *goat skins*, laden, or to be laden, on board the brig *Brutus*, at *Coringa*, in *India*, on a voyage from thence to *New-York*, valuing the said skins at 50 cents each." The policy was dated the 15th November, 1808, and the sum of 15,000 dollars was subscribed. It contained the usual printed clause respecting prior insurance.

The cause was tried at the *New-York* sittings, before Mr. Justice *Spencer*, in April, 1810.

The plaintiffs offered to prove, that on or about the 15th of November, 1808, they made application to the defendants for insurance, to the amount of 25,000 dollars, on *profits*, on the cargo of the ship *Brutus*, from *Coringa* to *New-York*, and informed them, at the time, of a prior insurance effected by the *Phoenix Ins. Co.* and that nearly the whole of the interest of the plaintiffs on board the said brig was covered by that insurance; but that (as the truth was) they had received a letter from their supercargo, informing them of the purchase and shipment of the *goat skins*, the cost of which in *India* was less than 10 cents per skin, when the value in the *United States* would be about 75 cents, or to that effect. That the defendants declined to make an insurance upon profits, *eo nomine*, as being against the rules of the company, but suggested that the purpose of the plaintiff might be as well effected, by valuing the premises to be insured; whereupon it was agreed between them, that the *goat skins* on board the said brig should be valued at 50 cents *a piece*, and that the sum of 15,000 dollars should be insured upon the same, at that valuation, by the defendants, at a premium, of twelve and a half *per cent.*, and the insurance was made on the said skins at the said valuation accordingly. That the plaintiffs were very desirous to have the skins valued at 75 cents, and the amount of insurance increased, but the defendants refused to value them higher than 50 cents: that the letter, mentioned by them, had then just been received by the plaintiffs, from their supercargo in *India*, and was the

mount, the difference between the invoice price of the cargo and charges, exclusive of and the 22,000 dollars, or amount of prior insurance, the residue would be the interest second policy; that it was immaterial whether the first policy was open or valued, if the skins, at 50 cents each, would furnish interest sufficient for both policies. (a) The valuation in a policy is conclusive on the insurers, if there is no fraud or imposition. (b)

(a) *Acc. Minturn v. Columbian Ins. Co.* 10 Johns. Rep. 75.

(b) *W'ley v. American Ins. Co.* 3 Cowen, 210. S. C. 5 Cowen, 712.

Insurance was made to the amount of 15,000 dollars, on "goat skins valued at 50 cents each;" and the policy contained the usual clause as to prior insurance. A prior insurance had been made, by an open policy, on the cargo, on board of the same ship, for the same plaintiffs, to the amount of 22,000 dollars. The prime cost of the skins was 10 cents each. Estimating the skins at 50 cents each, and the rest of the cargo at the invoice prices, and deducting the prime cost of the skins, the amount was sufficient for both policies; but the cargo,

[\*230] exclusive of the skins, was not sufficient to absorb the prior insurance. In an action on the second policy, it was held, that the whole of the *goat skins* were to be valued at 50 cents; and after deducting from this the *goat skins*, covered by the

ALBANY,  
August, 1811.  
KANE  
v.  
COM. INS. CO.

cause of the application to the defendants for the insurance. This evidence was objected to, but overruled, by consent, it being agreed between the parties, that in case it should be deemed admissible, and thought material by the court, a new trial should be granted, unless the court should be of opinion that the plaintiffs were entitled to recover on the case, according to their claim, without such evidence.

The *Brutus* sailed from *Coringa* for *New-York*, on the voyage insured, with a return cargo on board, the invoice cost of which, including the *goat skins*, was 19,420 dollars and 79 cents, making, together with the charges and premium of insurance, an insurable interest, on the *open* policy, to the amount of 22,000 dollars and upwards. Part of the cargo consisted of 58,629 goat skins, which, at *Coringa*, cost 5,331 dollars.

The vessel and cargo were captured by a *French* cruiser, and carried into *Cayenne*, and there condemned. Prior to the making of the policy of insurance in question, the plaintiffs had caused another policy to be made by the *Phoenix Ins. Co.* from *New-York* to *Coringa* and back, to the amount of 22,000 dollars, being an *open* policy of insurance, at a premium of 9 *per cent.* which was, afterwards, and prior to the policy in question, increased to 14 *per cent.* on account of a supposed deviation.

[ \* 231 ]

\*The value of the goat skins, at 50 cents each, was 29,314 dollars and 50 cents, and deducting the prime cost of them in *India*, left an interest on the second, or valued policy, according to the valuation, of 23,983 dollars and 48 cents. A verdict was taken as for a total loss, for the amount subscribed by the defendants, subject to the opinion of the court, on a case, as to what amount the plaintiffs were entitled to recover; and the verdict was to be modified accordingly, unless the court should think, from the facts in the case, a new trial ought to be awarded.

*S. Jones*, jun. for the plaintiffs. Taking the goat skins at the valuation in this policy, and the rest of the cargo at the invoice price, and deducting the prime cost of the skins, the whole interest is above 48,000 dollars, a sum more than sufficient for both policies. The only question is, whether this is not the correct mode of estimating the insurable interest. From the established rule on this subject, the defendants must be considered as admitting the value, as agreed to in the policy. (*Marsh.* 137. *Burr.* 1171.) In respect to this policy, we are to look to the agreed valuation; and unless the whole of such valuation is covered by the prior insurance, the defendants must be answerable for what is not covered by that policy. As it regards the present parties, the first policy is

*res inter alios acta*; and the two policies can be viewed in connection only for the purpose of carrying into effect the agreement as to prior insurance; and that agreement may be completely satisfied, without prejudice to the plaintiff's claim for the full amount of the present policy.

The case of *Murray and Mumford v. Insurance Company of Pennsylvania*, decided in the Circuit Court of the *United States* for the district of *Pennsylvania*, (*Condy's Marsh*, 152, a. 152, b. notes,) confirms the construction for which we contend, namely, "that the second policy will cover so much of the agreed value, as was not covered by the prior insurance."

\*An insurance on *profits* is considered as a *valued* policy on goods: (*Tom v. Smith*, 3 *Caines*, 245.) Now the goods may be abandoned to the insurers on goods, for a total loss; and the insurers on profits will be liable for the agreed value in the policy on profits. The plaintiffs offered to show that the defendants were apprized, that this was intended to be an insurance on profits; and that not being willing to insure them, they agreed that the subject should be so valued as to cover the profits. The parol evidence, so offered, did not contradict the contract; it served only to explain it.

[ \* 232 ]

*Wells*, contra. If the second policy had been open, it is perfectly clear, that the plaintiffs could recover no more than what remained uncovered, by the first policy, at the prime cost, or invoice price and charges. Policies of insurance are for the benefit of trade; and their real object is the indemnity of the insured. All beyond a complete indemnity for actual loss, is mere speculation. Parties who seek to recover beyond an indemnity, or for speculative profits, are not to be favored. If the plaintiffs obtain, on both policies, all that the property has cost, and all expenses and charges, will they not be fully indemnified? Will they not be fully covered?

In *Murray and Mumford v. Ins. Co. of Pennsylvania*, as reported in *Hall's Law Journal*, (vol. 1, p. 161,) both policies were valued, and the actual value was proved to be 6,000 dollars.

If the plaintiffs, in this case, are covered by the first policy, except for 1,000 dollars, they are to recover so much, according to the valuation in the second policy, and no more. If an abandonment had been made to the insurers on the first policy, what would remain, but this difference, to be abandoned to the insurers on the second \*policy? The plain language of this policy is, for as many of the skins as are not covered by the first policy, we agree to insure for you, at the valuation of 50 cents each.

[ \* 233 ]

If the doctrine contended for, on the part of the plaintiff, is

ALBANY,  
August, 1811.  
KANE  
v.  
Com. Ins. Co.

ALBANY,  
August, 1811.

KANE  
v.  
Com. Ins. Co.

established, then the plaintiffs might recover on this policy at a valuation of 50 cents; on a third policy, with a different insurance company, at a valuation of 75 cents; and on a fourth policy, with another insurance company, at 100 cents; and so on, to an unlimited extent. This would, in effect, render such insurances mere *wager policies*, or policies without interest.

If the plaintiffs intended this as a policy on *profits*, it ought to have been so expressed. The court will not convert a policy on goods into a policy on profits. (*Mumford v. Hallett*, 1 *Johns. Rep.* 43.) Parol evidence was inadmissible. Where there is a written contract, all parol conversations previous to its execution are disregarded, and the parties are confined to their written agreement. (*Vandervoort v. Com. Ins. Co.* 2 *Caines*, 156, 161. See also *Mumford v. M'Pherson*, 1 *Johns. Rep.* 414, 418.)

The case of *M'Kim v. Phoenix Insurance Company* in the Circuit Court of the *United States*, for the district of *Pennsylvania*, (*Condyl's Marshall*, 52, b. note. But see S. C. cited *Hall's Law Journal*, vol. 1, p. 166,) is analogous to the present. It is there said that the first policy covered so much of the coffee, as, at first cost and charges, would amount to 12,000 dollars, (the sum subscribed,) and the defendants on the second policy, which was on 125,000 pounds of coffee, valued at 22 cents per lb., were liable for the residue, to be valued at 22 cents per pound.

*Harrison*, in reply. The parties to this policy have agreed, that the skins insured are worth 50 cents each. It has always been held in *England* that profits may be covered, by including them in the valuation of the goods. In this country there is no law against *wager policies*. Suppose, after goods are shipped and insured, the owner discovers that they will be worth, at the port of delivery, a much larger sum, may he not, by another policy, cover \*this increased value? If there had been no prior insurance, it cannot be doubted that the plaintiff would recover on the second policy, for the whole of the skins, according to the valuation. How do the plaintiffs gain a double satisfaction in this case? The *indemnity*, which the insured has a right to claim, is the *value* agreed upon; otherwise, there is no difference, in effect, between an open and a valued policy. *Profits* may always be covered, if the insurer is apprised of the nature of the subject. It is done, either by insuring the profits, *eo nomine*, or by including them in the valuation of the goods. Why then should not the court give effect to the second policy? The prior policy is not to be resorted to for the criterion of value.

[ \* 234 ]

THOMPSON, J. delivered the opinion of the court. The policy in this case contains the usual clause respecting prior insurance, and it appearing in evidence, that 22,000 dollars had been previously insured, this must first be deducted, and the underwriters made responsible for the residue only. The prior insurance was by an *open policy* upon the cargo generally. The present is a *valued policy*, upon goat skins *specifically*, at 50 cents each. In order, therefore, to give effect to both policies, the first ought to be considered as attaching, in the first instance, upon that part of the cargo, not covered by the latter, in order to leave aiment for the latter. The cargo, exclusive of the goat skins, was not sufficient to absorb the prior insurance, and the only difficulty, in this case, is, to ascertain what portion of interest in the goat skins had been covered by the prior policy. In estimating the loss under that policy, the goat skins must have been reckoned at 10 cents each, that being the prime cost. This is a well settled rule, and it is equally well settled, that the valuation in a policy is conclusive upon the underwriters, when there is no suggestion of fraud or imposition. (2 *East.* 109. *Shaw v. Felton.*) The defendants are, \*therefore, stopped from saying they are not answerable for the goat skins at 50 cents, deducting the amount covered by the former policy. It is immaterial, as it respects the present defendants, whether the prior policy was open or valued; provided the goat skins at 50 cents each, will furnish interest sufficient for both policies. Suppose both policies had been on goat skins only, the first valued at 10 cents, and the second at 50 cents, would not the underwriters on the second policy, be answerable for the loss at 40 cents a skin, which would be the interest uninsured by the first policy? And what difference in principle can it make, whether the 10 cents are deducted in consequence of a valuation by the parties, or in consequence of that being the valuation fixed by law, the policy being open? The underwriters on this policy have no right to say, that because the assured had received 10 cents on each, that the skins had been *fully paid for*. They were *not* paid for, according to the valuation in this policy, which is conclusive upon the defendants. The policy is not that as many of the goat skins as remain *uncovered* by the former policy, at the invoice price, shall be covered by this policy at the valuation. This is not the sense and meaning of the contract. It is, that the goat skins laden on board shall be valued at 50 cents; and in determining how far the plaintiff's interest has been exhausted by the prior policy, all the goat skins on board are to be reckoned according to this valuation. No other construction will give effect to the contract. The prior policy was 22,000 dollars, and in order to determine how much of the plaintiff's interest was

ALBANY,  
August, 1811  
KANE  
V.  
Com. Ins. Co.

[\*235

ALBANY,  
August, 1811.

KANE  
V.  
COM. INS. CO.

[ \* 236 ]

covered by it, the invoice price of the cargo, exclusive of the goat skins, must first be ascertained, and whatever that sum, together with the usual charges, falls short of the 22,000 dollars, will be the sum to be deducted from the amount of the goat skins, at 50 cents each, in order to exhaust the prior policy; and the \*residue forms the interest upon which the second policy is to attach. And this, according to the *data* furnished by the case, will be more than the amount of the defendant's subscription in the present policy.

The case most analogous to this, is that of *M'Kim v. The Phœnix Insurance Company*, in the Circuit Court of the *United States*, for *Pennsylvania*, and which is mentioned by Judge *Washington*, in the case of *Murray & Mumford v. Insurance Company of Pennsylvania*. (1 *Hall's Law Journal*, 161.) There was a prior open policy, to 12,000 dollars, and a subsequent policy to 15,000 dollars, on coffee, (part of the same cargo,) at 22 cents per pound: And it was "decided that the first policy covered as much of the coffee as 12,000 dollars would absorb, at prime cost and charges, instead of the value fixed on that article in the second policy, which, of course, would leave to be covered by the second policy, as much less of the cargo, as the difference between the prime cost and charges, and 25 cents, would amount to, and for so much of the cargo, the *Phœnix Company* was held to be answerable." According to this report of the case, the underwriters on the second policy were held liable for the difference between the prime cost of the coffee, and the valuation in the policy subscribed by them. The report of the same case, in a *note* in *Condy's* edition of *Marshall*, (152, b.) might warrant a different construction; but is not so precise, and probably not so correct, for the case in *Hall* appears to be the report of the judge himself.

We are, accordingly, of opinion, that the plaintiffs are entitled to recover as for a total loss, to the amount of the verdict.

Judgment for the plaintiffs.

ALBANY,  
August, 1811.GRACIE  
v.  
NEW-YORK  
INS. CO.

## \*GRACIE against THE NEW-YORK INSURANCE COMPANY.

THIS was an action on an *open* policy of insurance, dated the 24th of *January*, 1807, upon the cargo on board the ship *Vermont*, at and from *New-York* to *Leghorn*. The policy contained a "written clause, warranted not to abandon, if captured, until condemned, or until after a detention of six months, after advice received here of the capture."

At the trial, the plaintiff proved an interest in the cargo insured, to the amount covered by the policy, and no more. The ship sailed the 30th of *January*, 1807, and was captured, during her voyage, by a *French* privateer, and carried into *Porto Ferrajo*. The ship and cargo were proceeded against by the captors, in the *Council of Prizes*, at *Paris*; and, upon the trial, the *Council of Prizes* decided, that the capture of the *American* ship *Vermont*, by the *French* privateer *Napoleon*, was null and illegal, and that both ship and cargo should be restored to the proprietors; and it accordingly ordered restoration to be made to the proprietors, discharging them from any bond or obligation that they might have given for the provisional delivery of the cargo, and condemning the owner of the privateer in all costs and charges, \* &c. It appeared also, that the captors appealed from the sentence of the *Council of Prizes*, to the *Council of State*; that upon entering the appeal, an arrangement was made by the consignees of the cargo, by which the cargo was delivered to them upon their executing *bonds*, with sufficient security, for the value of the cargo, to be fixed by appraisement, to abide the determination of the appeal. In consequence of this arrangement, the consignees of that part of the cargo which belonged to the plaintiff, gave a bond for the appraised value of the cargo, to abide the event of the appeal; and the cargo was thereupon delivered to them. It was appraised at about fifty *per cent.* advance upon the prime cost, and above the sum covered by the policy.

Insurance on  
goods, from N.  
York to Leg-  
horn. The ves-  
sel and cargo  
were captured  
by the French,  
and carried into  
*Ferrajo*. The  
ship and cargo  
were proceeded  
against by the  
captors, in the  
*Council of Pri-  
zes* at *Paris*,  
which court de-  
cided that the  
capture was il-  
legal, and or-  
dered a restitu-  
tion of the prop-  
erty, with costs  
and charges.  
The captors ap-  
pealed to the  
*Council of  
State*, and by  
arrangement  
between them  
and the con-

[ \* 238 ]  
signees, the  
property was  
delivered to the  
consignees, on  
their giving a  
bond to the a-  
mount of the  
appraised value  
of the property,  
to abide the de-  
termination of  
the appeal. The  
property was  
appraised at 50  
*per cent.* above  
the prime cost,  
and a bond giv-  
en for the a-  
mount, which

was greater than the sum insured. The cargo was taken to *Leghorn*, and there sold by the consignees, at an *advance* beyond the amount at which it was so appraised.

The *Council of State* reversed the decree of the *Council of Prizes*; and on reference of the decision of the *Council of State* to the *Emperor of France*, he confirmed the sentence, and declared the ship and cargo to be good and lawful prize.

The consignees having been compelled to pay the bond, the insured brought an action on the policy, for the amount insured. It was held, that the insured was not bound to *abandon* for a total loss, but might recover the amount paid on the bond, or as much as was covered by the insurance, as a partial loss. The *spes recuperandi*, in such a case, is not the subject of abandonment, for its value cannot be computed by a jury.

But there can be no *spes recuperandi*, where the sentence of condemnation has been affirmed, in the *last resort*, or by the definitive sentence of the highest tribunal of the country.

ALBANY,  
August, 1811.  
GRACIE  
v.  
NEW-YORK  
Ins Co.

On the 29th of *May*, 1808, the *Council of State*, after hearing the appeal, decreed as follows: "Considering that it is proved that the imperial decree of the 21st of *November*, 1806, might have been public in the *United States*, at the time of the departure of the ship *Vermont*; that in consequence, that decree is applicable to the said ship; considering, besides, that it results from the nature of the cargo, that a part of the goods on board are of *English* growth or manufacture, we decree that the decision of our imperial council of prizes, at *Paris*, of the 2d *September*, 1807, which declares the capture of the *American* ship *Vermont* to be illegal, and that the ship and cargo be restored to the proprietors, is hereby annulled and reversed." On the 27th of *October*, 1808, the *Emperor of France* issued the following sentence: "On the report of our grand judge tending to obtain the interpretation of our decree of the 29th of *May* last, which annuls the decision of our council of prizes in the case of the *Vermont* and her cargo; having examined the said decree, and that of the 21st of *November*, 1806, and considering that the decree of the 21st of *November*, 1806, is applicable to the present case, we declare, that the said \*ship *Vermont* and her cargo, are good and lawful prize."

[ \* 239 ]

Under this final sentence and decree, the consignees of the cargo were compelled to pay the *amount of their bond*, given for the appraised value of the cargo, as above mentioned. The cargo was taken to its port of destination, by the consignees, and there sold *at an advance upon the amount at which it had been appraised*, and delivered to them.

The plaintiff gave to the defendants, from time to time, all the information which he received relative to the subject matter of the insurance. On or about the 14th of *July*, 1810, the plaintiff informed the defendants, that he had received the documents relative to the capture of the *Vermont* and cargo, the first trial and sentence, the appeal and second sentence of reversal, and the bond and delivery of the cargo to the consignees, and called on them to pay the full amount insured, but at the same time expressed to them that it was not his intention to abandon to them the property in the hands of the consignees; but to give them such a power as might be necessary to prosecute their claim on the captors or the *French* government for illegal condemnation. Copies of the proceedings, &c. were delivered to the defendants, who offered to accept an abandonment, and pay a total loss; but declined paying the full amount insured, unless there was an abandonment.

On the 6th of *July*, the plaintiff wrote to the defendants, as follows: "I send you herewith invoice and bill of lading 180

of 107 boxes of *Havanna* sugars, shipped in the ship *Vermont*, for *Leghorn*, upon which I effected at your office, 4,500 dollars insurance, policy dated 24th *January*, 1807, which property having been condemned by the *French* emperor, I now call on you for payment of a total loss." The defendants answered, on the 9th *July*, 1810, that they were willing to accept of the abandonment \*made of the property insured, and that whenever the necessary abandonment and assignment were completed, they would pay a total loss; and at the same time requested information as to the disposition of the property by the consignees, &c. On the 12th of *July*, 1810, the plaintiff wrote to the defendants, as follows: "I find that your company have entirely misunderstood the meaning of my letter of the 6th instant, to which yours is an answer. I never intended to make any abandonment of the cargo of the *Vermont* to the company, nor does my letter contain any offer to do so. My claim is for a partial loss, which being greater in amount than what was insured by your company, I understood the term *total loss* to denote the *amount* of my claim, but by no means the nature of it. I claim from your office the amount of what my consignees were obliged to pay to obtain possession of the cargo, or so much of it as is covered by your policy."

To this letter the president of the company answered the next day: "The company consider the rights of the parties as fixed by your letter of the 6th of *July* instant, being an abandonment of the property, and their acceptance thereof by their letter of the 9th *July* instant. I can only say, the company repeat their readiness to pay you as for a total loss, and to receive from you a formal assignment of the property."

A verdict was found for the plaintiff, for the whole sum mentioned in the policy, subject to the opinion of the court on a case containing the above facts.

*D. B. Ogden* and *Boyd*, for the plaintiff. This case is new, and must be governed by the principles of the law of insurance, as there is no express adjudication in point. The insurers undertake that the property shall arrive at its port of destination, in safety, and that they will pay \*all the expenses, costs and charges incurred, by necessity, or in consequence of the périls insured against, in order to get the property to its destined port.

In *Berens v. Rucker*, (1 *Wm. Bl. Rep.* 313,) the insurers were held liable to pay the expenses of a compromise, *bona fide* made, to prevent the ship from being condemned as lawful prize, or to avoid a greater expense; and *Lord Mansfield*, in that case, observed, that the question was, whether the insured "acted *bona fide*, and uprightly, as men acting for

ALBANY,  
August, 1811  
GRACIE  
v.  
NEW-YORK  
INS. CO.

[ \*240 ]

[ \*241 ]

ALBANY,  
August, 1811.

GRACE  
v.  
NEW-YORK  
Ins. Co.

themselves, and upon a reasonable footing ; and it made no difference though the sentence was unjustifiable." It is on this principle that the cases of *ransom* proceeded, in *England*, until the practice of ransoming ships was prohibited by the statute of 22 *Geo. III. c. 25.* In the case of *Vandenheuvel v. The United Insurance Company*, (1 *Johns. Rep.* 406,) where a sum of money was paid by way of ransom, to prevent an appeal and avoid further detention, after the sentence of the admiralty court, the insurers were held liable.

The only difference between that case and the present is, that in the former, the insurer paid the money ; and in the present, a bond was given for the ransom or release of the property ; but the bond was more advantageous to the insurers, as it gave them a chance of a release from the payment, on an appeal. The mere giving the bond cannot vary the application of the principle of that decision.

But it will be said, that here was a technical total loss, and the insured must abandon, before he can call on the insurers for payment. It is true, if the insured does not abandon, he can only recover for a partial loss. It is optional with him, whether he will abandon or not, on receiving advice of capture. If he does not choose to abandon, he may take the chance of a release of his property, and call on the insurers to indemnify him for the loss actually sustained. "In every case of capture, the insurer is answerable to the extent of the sum insured, for the loss \*actually sustained\*, which may be either *total* or *partial*. (*Marsh. on Ins.* 495.)

In *M'Masters v. Shoolbred*, (1 *Esp. Cas.* 237,) Lord *Kenyon* held, that though the insured might have abandoned, on the capture, and so have made it a total loss ; but not having abandoned in the first instance, and having recovered the ship, (by purchase, under a sale by the captors,) he was bound to go for an average loss only.

Suppose the goods had been valued at less than the cost, and had been sold at a loss, and the plaintiff had abandoned and claimed a total loss, would not the defendants have said, "you have got your property on paying a certain sum, and that we are willing to pay and no more?" Besides, after the lapse of time which had taken place, the plaintiff had no right to abandon ; and the insured might justly object and say, "you come too late to claim a total loss, after waiting until the property reached *Leghorn*, and had been there more than 12 months."

If the plaintiff, after condemnation, had purchased the goods, he could not recover from the insurer more than he paid for their release. The money thus paid is considered as *salvage*, and if the voyage can be prosecuted, it is only a partial loss. (*Marsh. on Ins.* 581.)

Then, as to the alleged abandonment, we contend, that on the fair construction of the letters of the plaintiff, there was no abandonment, in fact, made.

*Hoffman* and *T. A. Emmet*, contra. If no decision of this question is to be found in the books, it is because this is the first time such a demand was ever made. On the first view of it, there appears something wrong and unreasonable in the claim of the plaintiff. If the property had been sunk in the sea, he could claim no more than the sum insured. Here the plaintiff, besides the amount insured, gets a profit of 120 *per cent.* If he \*can keep the property, and recover the full amount insured, there can be no inducement to abandon in case of capture and condemnation. By giving a bond, or paying a compromise, he keeps the property and recovers to the amount insured; and it can make no difference to the insured, at what rate he ransoms or compromises, if it does not exceed the sum insured. Such a doctrine must open the door to great fraud and injustice.

The cases cited were those of a *salvage*, ransom or purchase, which were made to prevent a condemnation. Here the plaintiff's claim is founded on the condemnation. The bond is given as a substitute for the goods. It has no legal efficacy or effect, until after a condemnation. It cannot be considered in the light of a purchase until the property has been condemned. The plaintiff cannot claim of the defendants the price of the goods, until he has transferred the goods to them. If this is a case of abandonment, the defendants are entitled to the profits, or they must bear the loss on the goods.

In case of an illegal capture, there is always a *spes recuperandi*. Can the insured recover the whole amount insured, and keep the *spes recuperandi* for his own benefit? *Park* (*Park on Ins.* (6th edit.) 192,) says, that before the insured can demand a recompence from the underwriter, for a total loss, he must abandon to him his right to all the property that may chance to be recovered from shipwreck, capture, or any other peril, stated in the policy. And this abandonment must be total, not partial; one part of the property cannot be retained, and the other abandoned.

Again, by the sale of the goods at *Leghorn*, the port of destination, the voyage and risk ended. A condemnation, afterwards, is not within the policy; for it could not affect the goods, but merely the bond given for them. Then no loss has happened on the goods during the continuance of the risk, or the existence of the policy.

Again, here was an abandonment and an acceptance of it, which fixed the rights of the parties. A formal \*transfer is

ALBANY,  
August, 1811.  
GRACIE  
v.  
NEW-YORK  
INS. CO.

[ \* 243 ]

[ \* 244 ]

ALBANY.  
August, 1811.

GRACE  
v.  
NEW-YORK  
INS. CO.

not requisite, until the money is paid. If the plaintiff intended to claim for a partial loss, there was no necessity to send such a letter, accompanied with the invoice, and bills of lading. A demand of payment for a total loss, where such loss is technical, does, *ex iure termini*, include an abandonment. Had the plaintiff chosen to insist on a total loss, would not his letter of the 6th *July*, have been sufficient evidence of an abandonment? The explanation afterwards given, was not made until three days after the receipt of the answer of the defendants.

KENT, Ch. J. delivered the opinion of the court. The plaintiff refused to abandon to the defendants the proceeds of the cargo at *Leghorn*, and claims the amount of the bond which he was obliged to give, and since to pay, on receiving back the cargo in *France*. His claim is equal, and even superior in amount, to what it would have been, if the property had perished; for the bond was for a sum equal to fifty *per cent.* advance upon the prime cost. The whole difficulty in this case arises from the refusal to abandon; for there cannot be a doubt, upon the correspondence between the parties, that no such abandonment was made.

There were two subjects to which the abandonment might apply, viz. the hope of ultimate compensation from the *French* government, and the proceeds of the cargo at the port of destination.

All the books agree that the assured is never obliged to abandon; and if he does not, he is always entitled to recover to the extent of his loss. The object of abandonment is to turn that into a total loss which otherwise would not be so. But here the loss is equal to a total loss, and the plaintiff must recover the amount of the bond, (at least as far as the subscription covers it,) or nothing at all, for there is no rule by which the damages \*can be estimated at any less sum. To attempt to ascertain the value of the *spes recuperandi*, as it respects the claim on the *French* government, and to deduct that value from the recovery, appears to me to be useless. I cannot assent to what was said upon this point in the case of *Watson & Paul v. The Insurance Company of N. A.* (1 *Binney*, 47,) (a) for a jury is wholly incompetent to calculate that value. There is no possible rule of computation. Where any part of the property exists *in specie*, a jury may have a rule to go by; as when a vessel is stranded, and is still alive; but it would be perfectly arbitrary to undertake to estimate the worth of such a hope, in this case. If that hope does

[\*245]

(a) The case alluded to, has since been virtually overruled in *Brown v. Phoenix Ins. Co.* 4 *Binney*, 445.

gally exist, so that it can be judicially regarded, the plaintiff ought to renounce it in favor of the insurer, or not recover at all. But there is no existing hope of recovery in this case. The law had pronounced a definitive sentence in the highest tribunal. The condemnation was affirmed in the *last resort*, by the emperor himself, and any chance of reimbursement under that sentence must be the result of future negotiations between the two governments, and that is a subject totally unfit for the investigation of a jury. No court is competent to act upon such speculations. And if *France* should, at any future period, agree to, and actually make compensation for the capture and condemnation in question, the government of the *United States*, to whom the compensation would, in the first instance, be payable, would become trustee for the party having the equitable title to the reimbursement, and this would clearly be the defendants, if they should pay the amount of the bond. There would be no doubt of their claim in equity; and the case shows that the plaintiff offered to give them the requisite authority to assert this claim upon the *French* government. But all this was useless. No individual could prosecute this claim. There was no further appeal left. There was no legal redress remaining, in contemplation of law, and, therefore, there was no *spes recuperandi* existing, or none which could be the subject of liquidation.

An abandonment, then, as to this point, would have been as idle as if the property had perished at sea. It is settled, that if a total loss actually exists, the assured may recover as for a total loss, without abandonment. To make an abandonment when there is nothing to abandon, is absurd.

The case then comes to this, whether the plaintiff cannot recover the amount of his loss, without abandoning the proceeds at *Leghorn*. If he cannot, he must either be content to bear the heavy loss of the amount of the bond, or content himself with the prime cost and charges, and suffer the insurer to reap the gain and profit of the voyage. Neither alternative is within the spirit or equity of the contract. The insurer has nothing to do with these proceeds any more than he would have, if the vessel had been robbed on the voyage of part of her cargo, or the captain had been compelled to ransom the vessel from pirates. He is bound to save harmless the assured from such intermediate loss. If the plaintiff recovers the amount of the bond, he is only indemnified, and is placed in the same situation, as if the peril had not intervened. If the intervening *péril* had produced a loss of less than the prime cost; say, for instance, a loss of 60 *per cent.* there would have been no difficulty about the recovery; for that was the case in *M'Masters v. Shoolbred*. (1 *Esp. N. P.* 237.) In that case, there was a capture and repurchase, and no abandon-

ALBANY,  
Aug 1st, 1811.  
GRACIE  
v.  
NEW-YORK  
Ins. Co

\* 246 ]

ALBANY,  
August 1811.

GRACIE

v.  
NEW-YORK  
INS. CO.

247 ]

ment; and Lord *Kenyon* ruled, that the plaintiff was entitled to his indemnity, as in the case of a ransom, which was the sum paid for the repurchase of the ship, and the expenses, amounting to an average loss of 60 *per cent.* So it was said by Lord *Mansfield*, in the case of *Goss v. Withers*, that if, after condemnation, the owner recovers the ship captured, but has paid salvage, or been at any expense \*in getting her back, the insurer must bear the loss actually sustained. Whether the amount of the ransom, or salvage, or repurchase, in these cases, falls short or goes beyond the prime cost of the subject, does not alter the principle, nor affect the question of abandonment. The assured receives no more than his indemnity, by being reimbursed the sum he has paid. The voyage goes on, and becomes a matter of profit or loss, precisely as if the peril had not happened. I do not perceive any principle that requires the assured to abandon the property so reclaimed, when the amount of the money paid exceeds the prime cost of the article, and which does not require it when the amount is less. He is only to abandon when he goes for the whole subject as lost, and part of it remains, or the hope of its recovery exists. He is not to make a profit of the insurance. He is not to be paid for the whole subject while he retains part, or is supposed to be capable of recovering part. He shall recover only as for an average loss, provided it be a case susceptible of computation as an average loss. But in this case, he asks only for the money he has been obliged to pay. He cannot possibly make the insurance lucrative. He asks only to be indemnified from the peril; and whether the property recovered went to a rising or falling market, is a question not belonging to the case. That event remains the same as if there had been no capture. If property be ransomed from pirates or enemies, or recovered from shipwreck, at a loss of 60 *per cent.* the remainder may possibly go to a market which will render the voyage profitable, even if there had been no insurance, and the expense incurred was a dead loss. So the voyage may be ruinous, if only one *per cent.* be taken away by a peril, and that one *per cent.* be insured. The insurer, in a case like this, has nothing to do with these results. He must return the money which the assured has been obliged to \*pay, in consequence of a peril, provided it was fairly and *bona fide* paid, and does not exceed the amount of his subscription.

[ \* 248 ]

I am aware that the *French* law of insurance is different, as the *ordinance of the marine* has a particular and very equitable provision on this subject. If the insurer, under that ordinance, be called upon to pay the amount of a ransom or composition, he is entitled to take the profit of it, by becoming proprietor of a portion of the effects redeemed, in a ratio to

the amount of his subscription. (*Ord. des Assurances*, art. 67, 68. 1 *Emerig.* 467. 472.) But the *English* rule is otherwise. The insurer must pay the amount of the composition, if it be reasonable and *bona fide*, without being entitled to any interest in the proceeds. This not only appears from the cases already referred to, but from the decision in *Berens v. Rucker*, (1 *Black. Rep.* 313. *Park*, 89. 6th edit.) which has always been regarded as good law.

Nor is the assured, in this case, to be limited to the prime cost of the subject. That is only resorted to when it becomes necessary to ascertain the value of the subject insured, or what is the same thing, the amount of the loss. It is a rule of computation which ceases when the parties have fixed the value, or it can be ascertained (as in this case) by another and more obvious rule, viz. the sum actually paid. The latter is in this case the just and *certain* test of the amount of the loss, and I do not know of any decision or principle which forbids us to resort to it.

The court are accordingly of opinion, that the plaintiff is entitled to judgment for the amount of the verdict.

Judgment for the plaintiff.

ALB. NY,  
August, 1811.  
POWELL  
v.  
SMITH.

\*POWELL against SMITH.

[ \* 249 ]

THIS was an action of *assumpsit*. The declaration contained three counts. The first count stated that the defendant, on the 20th *July*, 1807, was indebted to *Pennoyer & Colden*, in the sum of 478 dollars and 41 cents, for which the defendant, on the 26th *July*, gave his promissory note, payable in 60 days after date; and in consideration that the plaintiff, at the special instance and request of the defendant,

*A.* gave a pro  
missory note to  
*B.* payable in  
sixty days, and  
in consideration  
that *C.*, at the  
request of *A.*,  
would also sign  
the note, as  
surety. *A.* un-  
derst<sup>d</sup> and  
promised to  
pay to *B.*

take up the note when it became due, and to *indemnify C.* and save him *harmless* from all damages and costs, which he might sustain by reason of signing the note, &c. and *A.* did not take up the note, &c.; but *C.* was sued by *B.* who recovered a judgment against him, on which *C.* was taken in execution and committed to prison.

In an action of *assumpsit* brought by *C.* against *A.* the latter pleaded that *C.* was discharged from his imprisonment under the execution, by virtue of the act-for the relief of debtors, &c. and had never paid the note, or the judgment against him, or any part thereof, &c. On *demurrer* the plea was held bad, and that the plaintiff was entitled to recover on the promise to indemnify.

A surety, *qua* surety, cannot call on his principal, at law, until he has actually paid the money. (a) And where no promise to indemnify was proved, nor the payment of any money by the surety, though he had been sued and charged in execution for the debt of the principal, but afterwards discharged under the insolvent act, he was held not entitled to recover in an action against the principal.

(a) An extinguishment of the debt by giving a negotiable note, if it is received in satisfaction of a judgment against the principal or by a conveyance of land, will enable the surety to recover in *assumpsit*. *Witherby v. Mann*, 11 *Johns. R.* 518. *Bonney v. Seeley*, 2 *Wendell*, 481. But he can recover no more than the amount actually discharged. *Bonney v. Seeley*, *ubi supra*.

ALBANY,  
August, 1871.

POWELL  
v.  
SMITH.

would execute the said note with the defendant, as security to the said *Pennoyer & Colden*, the defendant then and there undertook and promised to take up the note when it was due, and to save harmless and indemnify the plaintiff from all damages and costs he might sustain, by reason of signing the said note, &c. The plaintiff averred that he did sign the note, &c.; yet the defendant did not take up nor pay the said note, nor save the plaintiff harmless, &c., but that *Pennoyer & Colden* brought a suit on the note in the Court of Common Pleas, in *Duchess* county, against the plaintiff, as impleaded with the defendant, and the plaintiff was arrested, but the defendant was not taken, and did not appear, and *Pennoyer & Colden*, in *January*, 1810, obtained a judgment on the note against the plaintiff for 211 dollars and 3 cents, damages and costs; and that the plaintiff was taken on a *ca. sa.* issued on the judgment the 15th of *March*, 1810, and confined in the gaol of *Duchess* county, &c. of all which the defendant had notice, &c.

The second count was like the first, with the addition, that by means of the premises the defendant became liable to pay to the plaintiff the amount of the said judgment; \*and being so liable, in consideration thereof, undertook and promised to pay the same to the plaintiff, &c.

The third count was for money paid, and money lent, and money had and received to the use of the plaintiff.

The defendant pleaded, 1. *Non assumpsit*, on which issue was joined; 2d. As to the first and second counts, that the plaintiff, on the 25th *June*, 1810, pursuant to an act of the legislature for the relief of debtors, with respect to the imprisonment of their persons, passed the 24th of *March*, 1810, was discharged from his imprisonment under the said *ca. sa.* by the Court of Common Pleas of *Duchess* county, and that the plaintiff has never paid the said note or judgment, or any part thereof, &c.

To the second plea there was a general demurrer and joinder.

The cause was tried, on the general issue, at the *Duchess* circuit, in *September*, 1810, when a verdict was, by consent, taken for the plaintiff, subject to the opinion of the court on a case.

At the trial the facts stated in the first count were proved; but no *promise* to save harmless or indemnify the plaintiff was shown or proved.

A motion was made to set aside the verdict and for a new trial, which, with the *demurrer*, was submitted to the court, without argument.

*Per Curiam.* Two questions are presented to the court

The one relates to the validity of the second plea, and the other respects the rule or measure of damages upon the facts disclosed at the trial.

1. The plea is clearly bad. The declaration not only charges the defendant with promising to take up the note, which the plaintiff signed as surety, but also to *indemnify and save harmless* the plaintiff from all cost and damage in consequence of his becoming surety in the note. It also states a special harm and damage by being sued \*upon the note, and charged in execution. The fact of the plaintiff's discharge from imprisonment, as an insolvent debtor, was no answer to this charge, or compensation for this injury. He was certainly entitled to recover on the promise of indemnity.

2. The only serious question in the case is, what ought to be the rule of damages. There was no proof at the trial of any promise to save harmless, and the plaintiff must recover, if at all, upon the simple fact of having signed a note as surety for the defendants, and of having been sued upon it, and charged in execution. The case of *Chilton & Whiffin v. Cromwell*, (3 Wils. 13,) has been referred to, as somewhat analogous. The declaration in that case stated, that the plaintiff had accepted a bill drawn on him by a partner of the defendant, under a promise by the defendant to take up the bill when due, and to save the plaintiff harmless; that the bill was not taken up, and the plaintiff was sued upon his acceptance, and was charged in execution when he brought the suit. It did not appear that he had paid the money, or any part of it, and the court of C. B. held that he was entitled to recover the amount of the judgment, and that being charged in execution was the same thing for him as payment of the debt and costs. The promise of indemnity was enough to support the action in that case, but there appears to be much difficulty in applying to this case, the position, that the being charged in execution was payment of the debt. It would not be true in its application here. The imprisonment of the surety on a *ca. sa.* is no satisfaction to the creditor for his debt, or discharge of the principal debtor. (*Blumfield's* case, 5 Co. 86, b. *Peacock v. Jefferey*, 1 *Taunt.* 426.) If the plaintiff has not, in fact, paid the debt, the defendant is still answerable to the payees of the note, for whatever sum remains due thereon. Suppose a surety is taken on *ca. sa.* for a debt of 10,000 dollars, and discharged the next day, under the insolvent act, is he entitled to recover that whole sum of his principal, \*without ever having paid a cent of it, and when the principal may be obliged to pay the sum also to the original creditor? This would not be reasonable, and cannot be the true rule of law. The surety is entitled to recover as much of the debt as he has paid, and no more. The plaintiff did not, upon the trial,

ALBANY,  
August, 1811.  
POWELL  
v.  
SMITH.

[ \* 251 ]

[ \* 252 ]

ALBANY,  
August, 1811.

P. WELL  
v.  
SMITH.

show any contract or promise of indemnity against trouble and harm. He showed nothing more than that he had become surety in a note for the defendant, and that having omitted to take it up when it fell due, he had been sued and imprisoned. This fact alone did not entitle him to recover. A surety, *qua* surety, cannot call upon his principal, at law, until he has actually paid the money. The law then raises the *assumpsit*, and the form of the action is an *indebitatus assumpsit* for the money paid, and not on a promise to indemnify. (Coup. 525. 1 *Term Rep.* 599. 2 *Term Rep.* 100. 2 *Esp. N. P.* 528.) The court, in the case in *Wilson*, agree that there was no debt due or owing from the principal to the surety, *until he was charged in execution*. And we cannot see how that additional circumstance should create the debt, as it was neither a payment to the creditor, nor a discharge to the principal debtor. The case of principal and surety in a note or obligation to a third person, has no analogy to that of a principal and bail in a suit at law; and the doctrine in *Smith v. Rosecrantz*, (6 *Johns. Rep.* 97,) is altogether inapplicable. The latter is a technical rule, founded on the nature of the recognisance of bail under which the taking of one is the discharge of the other. This is not so, as to the relation of principal and surety. They are equally debtors to the plaintiff; and it was a principle acknowledged as far back as the *Roman* law, (*Inst. lib. 4, tit. 14, s. 4,*) that a discharge of the debtor under a *cessio bonorum*, was no discharge of the surety.

As the plaintiff, then, in this case, did not show upon the trial, the payment of any part of the debt, he was not entitled \*to recover, and judgment must be rendered for the defendant.

[\*253]

Judgment for the defendant.

ALBANY,  
August, 1811.

CRAWFORD  
v.  
MORELL.

CRAWFORD and others, Executors of CRAWFORD,  
*against* MORRELL.

IN *error*, from the Court of Common Pleas of *Orange* county.

The defendant in error, brought an action of *assumpsit*, against the plaintiffs in error, as executors of *David Crawford*, deceased, in the court below. The second count in the declaration was, as follows: "And whereas also, afterwards, in the life-time of the said *David*, to wit, on the 9th of *May*, 1802, at *W.*, &c. a certain discourse was had and moved between the said *David Crawford* and *John Morrell*, touching and concerning a certain road, before that time laid out and regulated by the commissioners of highways of, &c. and a certain ferry, leading from the *Goshen* road, so called, through the land of the said *John*, in, &c. to the east bank of the *Wallkill*, near, &c. being two rods wide, which said road, before then, and after it was so laid out, by the said commissioners and jury, to wit, on the 19th of *April*, 1802, had been, in due form of law, altered, by three of the judges of the Court of Common Pleas of the said county, on an appeal to them, made by the said *John*, from the decision of the said commissioners and jury, &c. and the said decision, &c. was in due form of law reversed and annulled, \*&c. by reason whereof, the said *David* was deprived of the use and enjoyment of the said road, &c. and became desirous that the said *John* should, for the benefit and advantage of the said *David*, permit the said road, so far as it extended through the lands of the said *John*, to continue and remain open, &c. And it was then, &c. at the special instance and request of the said *David*, agreed and promised, by and between the said *David* and *John*, that the said *John* should suffer and permit the said road to remain open, &c. for the benefit and convenience of the said *David*, &c.; and that the said commissioners might lay out the said road, over and through the lands of the said *John*, as aforesaid, and that the same might, in due form of law, be recorded as for a road, &c. And the said *David*, on his part, agreed to pay to the said *John*, at the rate of 18 dollars and 75 cents, for the one half of the land included in the said road, so far as the said road ex-

separate piece of land; it was held that the latter part of the contract being void by the statute of frauds, the whole being an entire contract, was void.<sup>(b)</sup>

(a) *Van Alstyne v. Wimble*, 5 *Coves*, 162, *acc.*

(b) But a promise to pay the owner of land a specific sum, on his consenting to have a public highway laid out through his lands, is not within the statute of frauds. *Storms v. Snyder*, 10 *Jahns. Rep.* 109. *Noyes v. Chapin*, 6 *Wendell*, 461.

A contract must be proved as laid in the plaintiff's declaration. He cannot give in evidence an entire contract relating to two distinct subjects, when he declares only as to one of them.

Where the plaintiff declared on a contract by which the defendant agreed to pay him a certain sum, for *half* the land taken for a certain road; and the contract proved at the trial was, that the defendant was to pay for *all* the land, the variance

[\*254]

was held fatal.

If part of one entire contract be illegal and void, the whole is void. (a)

Where the plaintiff declared on a parol contract to pay him for certain land given for a public highway; and the contract proved was, that the defendant was to pay the plaintiff, not only for the land given for the highway, but also for a distinct and

ALBANY,  
August, 1811.

CRAWFORD

v.

MORRELL,

tended across the lands of the said *John*, so soon as the same should be again laid out by the said commissioners, &c. And the said *John* avers that the one half of the lands so included in the said road, extending across the lands of the said *John*, is one acre and a half, amounting to 28 dollars and 12 cents. And the said *John* further avers that he hath in all things well and truly kept, fulfilled and performed all things in the said agreement, on his part, &c.; and that afterwards, in the life-time of the said *David*, to wit, on the 9th *May*, in the year aforesaid, in pursuance of the said agreement, did permit and allow the said road to be, remain, and continue open, &c.; and that the said road, in the life-time of the said *David*, was laid out anew, &c.; and was, in due form of law, recorded, &c. Nevertheless," &c.

The defendant pleaded, 1. *Non assumpsit* by the testator; 2. *Plene administravit, prater* 75 dollars; on which there was a judgment of *assets quando acciderint*. On the second plea a verdict was found for the plaintiff, \*for 48 dollars and 11 cents, on which judgment was rendered by the court.

[\*255]

The defendants below tendered a *bill of exceptions*, which stated, that the plaintiff gave in evidence, that in the spring of 1802, the road mentioned in the second count of the declaration, was laid out by the commissioners and jury; and that their determination relative to the said road, on appeal to the judges of the Court of Common Pleas, was reversed. And that, afterwards, the testator, in consideration that the said *John* would permit the road to be again laid out by the said commissioners, and suffer it to remain open for a road, undertook and promised to pay the said *John*, at the rate of eighteen dollars and seventy-five cents per acre, for *all the lands* of the said *John*, included in the said road; and that the lands included in the said road, were two acres and a half; and that the road was laid out, &c. That the witness, on being cross-examined, said, that the said *David* also agreed to pay to the said *John*, at the same rate, for certain lands in the possession of the said *David*, of which the said *John* claimed to be the owner, and which were separate from the farm of the said *John*, and that the whole was one entire agreement.

The defendants offered to prove that the plaintiff had no title to the land; and that the road had been used as a public road for twenty years, before the 21st *March*, 1797, but this evidence was overruled by the court.

The errors assigned were, 1. That the contract stated in the second count was illegal and void, for want of consideration; and against the policy of law, as unconscientious and founded in extortion.

2. That the plaintiffs below were bound to produce the record of the determination of the commissioners, and the 192.

record of the decision of the judges of the Court of Common Pleas reversing the first determination of the commissioners.

3. That it appeared from the evidence, that the contract \*set forth in the second count, was *part* of an *entire* agreement, set forth in the first count, and that part being void by the statute of frauds, the whole was void.

4. That there was a *variance* between the contract laid in the declaration, and the one proved at the trial.

5. That the evidence offered by the defendant below, and rejected by the court, ought to have been received as an absolute bar to the action.

6. That the verdict was erroneous; as the plaintiff avers that he was entitled to receive, by virtue of the contract, twenty-eight dollars and twelve cents; and the verdict was for forty-eight dollars and forty-two cents.

*J. Duer*, for the plaintiffs in error.

*Fisk*, contra.

*Per Curiam.* The third and fourth objections taken to the legality of the recovery below, are equally well founded. The contract proved, varied from the contract laid, inasmuch as the contract proved was, that the testator was to pay for all the land included in the road, and the contract as laid was, that he was to pay for one half. This variance was material and fatal. A contract must be proved as laid, and the plaintiff cannot give in evidence an entire contract, relating to two subjects, when he declares for one. (1 *Lord Raym.* 735. 1 *Term Rep.* 240. 1 *East*, 1. 1 *Campb. N. P.* 361.) The contract as proved was, that the testator was to pay, not only for the land included in the road, but for other lands in possession of the testator, and claimed by *Morrell*. This was part of the same contract, and this last part was void by the statute of frauds; and if part of one entire contract be illegal and void, the whole is void. (*Crater v. Beckett*, 1 *Term Rep.* 201.) The judgment below must be reversed.

ALBANY,  
August, 1811.

CRAWFORD

v.

MORRELL.

[ \* 256 ]

ALBANY,  
August, 1811.

VAN BEN-  
THUYSEN  
v.  
CRAPSER.

\*VAN BENTHUYSEN and another against CRAPSER.

*A. covenant-  
ed on the 30th  
of March, 1799,  
to convey to B.,  
by a good war-  
ranty deed, at  
the reasonable  
request of B., a  
certain lot of  
land; and "for  
which B. cove-  
nanted to pay  
to A. a certain  
sum of money,  
one half in  
three, and the  
other half in six  
years."* The  
lot was under  
a mortgage,  
dated in Janu-  
ary, 1799, and  
which was re-  
gistered at the  
time the con-  
tract was made,  
which mort-  
gage was not  
discharged of  
record until  
August, 1809,  
but the certifi-  
cate of dis-  
charge had  
been given in  
February, 1808.

[\*258] In  
1803, or  
1804, B. had  
demanded a  
deed of A.,  
which he re-  
fused, saying it  
was not in his  
power to give a  
deed, as the lot  
was under  
mortgage. In

Nov. 1803, A.  
tendered to B.  
a deed with all  
the usual cov-  
enants and warranty,  
which B. refused to accept; and in an action of covenant brought by A. against  
B. for the money agreed to be paid, it was held, that the refusal of A. to convey, on the ground of his  
inability to give a good title, was a default of which B. might avail himself as a defence against the  
action; that after such refusal, B. was not bound to tender the money, nor to accept the deed after-  
wards tendered to him.

If a seller will not make an assurance when reasonably demanded, he loses the benefit, and the pur-  
chaser is not bound to wait until he is able to convey; and it seems, that after a continued neglect and  
inability of the seller for six years subsequent to a request and refusal to convey, neither a court of law  
nor equity would interfere to enforce the performance of the agreement. (a)

(a) Vide *Greenby v. Cheavers*, 9 Johns. Rep. 196, *Fuller v. Hubbard*, 6 Cowen, 13

to receive the deed or pay the money ; and the present action was commenced the twenty-ninth of *March*, 1809.

It appeared that the plaintiffs had executed a mortgage, the twenty-sixth of *January*, 1798, to one *Thurman*, for two large tracts of land, one of which included the lot in question, which mortgage was registered the sixth of *February*, 1799, and was afterwards taken up and cancelled. The certificate of discharge was dated the fourth of *February*, 1808, and duly proved the twenty-eighth of *August*, 1809, and the registry of the mortgage discharged the twenty-ninth of *August*, 1809.

It was proved, that about seven years before the trial, the defendant, in a conversation with one of the plaintiffs, demanded a deed for the lot in question ; and it was answered, that it was not in the power of the plaintiffs to give a deed for the lot, as it was covered by a mortgage to *Thurman*.

It appeared that the plaintiff, of whom the deed was demanded, was indebted to the defendant for more money than the price of the land, and the defendant urged a settlement between him and the plaintiffs of all dealings. The defendant did not pretend to have a demand against both plaintiffs, nor did he tender any money when he demanded a deed ; but said that if, upon a settlement, \*any money should be found due to the plaintiffs for the land, he would pay it immediately. Similar conversations between the defendant and the same plaintiff took place subsequently, at two different times. The defendant was a man of property and credit.

ALBANY,  
August, 1811.

VAN BEN-  
THUISEN  
v.  
CRAFSER.

[ \* 259 ]

*P. W. Radcliff*, for the plaintiffs, contended, 1. That the covenants were mutual and independent, and that the defendant was liable, at all events, for the purchase money. He cited 1 *Saunders*, 320. note 4. *Willes*, 157. note a. 2 *Hen. Black.* 389. 2 *Johns. Rep.* 208. 272. 388. 5 *Johns. Rep.* 78.

2. That if the covenants were not independent, the plaintiffs having tendered a performance of the covenant on their part, before the action was brought, were entitled to recover.

A mortgage *registered* is notice to all persons ; (2 *Johns. Rep.* 510. 613;) and so the parties must be presumed to have entered into the contract with full knowledge of the existence of the mortgage ; and it was evident also, that the defendant intended to rely on the covenant of warranty to be inserted in the deed.

A mortgage is considered by courts of equity as a mere security. (1 *Johns. Rep.* 590. 4 *Johns. Rep.* 42.)

It is sufficient that the party has a good title at the time of performance, though he had none at the time of the contract. (*Powell*, 266, 267.) In *Clute v. Robison*, (2 *Johns. Rep.*

ALBANY,  
August, 1811.

VAN BEN-  
THUYSEN  
v.  
CRAFSER.

[\* 260]

595. 5 Co. 21,) it was held, that if the party covenanting to sell and convey, has a good title at the time of the coming in of the master's report, or of the decree, it is sufficient. Notwithstanding, then, the mortgage was existing at the time of the contract, the plaintiffs, at the time the deed was tendered, had, and now have, a perfect title.

A covenant cannot be discharged by *parol*; (2 Wils. 376. 6 Co. 44. a. 3 Johns. Rep. 364. 367;) nor can the mere lapse of time, in this case, discharge the covenant. A purchaser is not discharged from his contract, merely because the vendor says he is not ready to perform, \*unless the purchaser, at the same time, tenders a performance on his part.

*Slosson*, contra, contended, 1. That the covenants were dependent. He cited 1 Fonbl. 382. 1 Ld. Raym. 662. 1 Salk. 122. 4 Term Rep. 761. Cowp. 56. Doug. 684. 688. 1 East, 619. 6 Term Rep. 571. 668. 1 Hen. Black. 270.

2. If the vendor cannot, when called upon at the time, make a good title, the purchaser may, afterwards, set up the want of title in defence; (1 Esp. Cas. 184, 185. 2 Esp. Cas. 640. *Sug. Law of Vend.* 250, 251;) and here the plaintiffs were called upon for the deed, seven years before the commencement of the action, and had not, for near ten years, a clear title. The defendant had a right to consider the contract as at an end.

A purchaser will never be compelled to accept a doubtful title, and pay the purchase money. (2 P. Wms. 198. 1 Ves. jun. 56, and *Powell on Contracts*, 34.) He has a right to insist on a clear, undoubted, and perfect title.

And if the vendor is not ready at the day appointed, with the title deeds, no action lies against the purchaser, for the non-performance of his agreement. (*Sug. Law of Vendors*, 246.)

*Per Curiam.* It does not seem to be requisite to determine whether the covenants between the parties were or were not independent, because, admitting them to have been independent, the question still arises whether the defendant is not discharged from his covenant by the refusal and inability of the plaintiffs to convey upon request. A party is not to continue always bound by a single, independent covenant. He may be discharged by the default of the other party. To understand the sense of the contract, we must look at the whole instrument. The tender of a deed by the plaintiffs, in 1809, did not help them, provided the defendant had been already discharged from the contract.

[\* 261]

\*This tender was nearly ten years after the date of the 196

covenant, and the case states, that about seven years before the trial, and which must have been in the year 1803, and nearly six years before the tender, the defendant demanded a deed of one of the plaintiffs, who replied, that it was not in the power of the plaintiffs to give a deed, as the land was covered by a mortgage. This refusal to convey upon request, and on the ground of inability to convey a good title, was a default which the defendant might avail himself of, and which he has not waived by any subsequent act. No tender of payment was shown at the time of this request, nor was this necessary, for the plaintiffs did not rest the refusal upon that ground, but on their inability to perform the contract, and such being the fact, a tender would have been useless. At the time of the execution of the covenant, and for ten years afterwards, the lands were encumbered by a heavy mortgage, and the plaintiffs were unable to convey a good title, as their covenant undoubtedly purported. Is not such refusal and inability a valid defence? The defendant was not bound to accept of the deed when the plaintiffs tendered one nearly six years afterwards, unless he was to remain perpetually liable; and the plaintiffs had their whole life-time to perform their covenant. This would be a hard and unreasonable construction, and against established principles. In *Legate v. Hockwood*, (2 *Chan. Cas.* 5,) and which was as early as the reign of *Charles II.* the lord chancellor declared, that if a man buys land, and the seller will not make an assurance, when reasonably demanded, he shall lose the bargain, for the party ought not to be perpetually bound, without having a performance. And in the late case of *Thompson v. Miles*, (1 *Esp. N. P.* 184,) Lord *Kenyon* advanced the same doctrine, that if a party sells an estate, and cannot make a title when called upon for it, the defendant may set up against the plaintiff that want of title. The inability and refusal enables the buyer, as \*he says in another place, (2 *Esp. N. P.* 640,) to consider the contract at an end. After a continued neglect and inability on the part of the plaintiff, for six years, subsequent to a request and refusal to convey, it is not probable that a court of equity would interfere and decree a performance. (1 *Fonbl.* 384. note e.) The general principle which has been mentioned, is recognised equally at law and in equity. Judgment must therefore be rendered for the defendant.

ALBANY.  
August, 1811.

VAN BEN-  
THUYSEN  
v.  
CRAPSER.

[ \* 262

ALBANY,  
August, 1811.

JACKSON  
v.  
SELLICK.

JACKSON, *ex dem.* BEEKMAN, *against SELLICK*

Where a *feme covert* is the owner of wild and uncultivated land, she is considered in law, as in fact, possessed, so as to enable her husband to become a *tenant by the curtesy*.

An actual entry or *pedis possessio* by the wife or husband, during the *coverture*, is not requisite to the completion of a tenancy by the curtesy.

Lands descended to A. a *feme covert*, who had a

[\* 263] daughter C. born in 1756. A. died in 1764, and B. her husband died in 1784. C. the daughter, married D. in 1783. An adverse possession was taken of the land in 1772, it being then vacant and uncultivated; and C. after the death of her husband, in 1807, brought an action of ejectment; it was held that B. being a tenant by the curtesy, no right of entry accrued to C. until after the death of B. in 1784, and that C. being then a *feme covert*, was not bound to bring her action

THIS was an action of ejectment, for land in the *Minisink Angle*, in *Orange* county. The cause was tried at the *Orange* circuit, in *September*, 1810; before Mr. Justice *Van Ness*. A verdict was taken, by consent, for the plaintiff, with liberty to the defendant to move to set it aside, on a case containing the following facts:

A large tract of land, including the premises in question, was granted by letters patent; dated the twenty-eighth *August*, 1704, to *Matthew Ling*, and twenty-two others, among whom

was *John Parson*, to be held, one twenty-third part thereof, to each of the patentees, in fee-simple. *Parson*, by deed, dated twenty-sixth *November*, 1706, reciting the patent, conveyed his twenty-third part to *Henry Van Ball*, with covenant of warranty. A partition was made by commissioners, under the colony act of the seventh *Anne*, on or about the thirty-first *March*, 1715, of that part of the tract called the *Angle*, of which the premises in question are part, and by which the premises in question were allotted to *Henry Van Ball*, for his share thereof, in severalty. *Van Ball*, being owner of the premises, and other \*lands, made his will, the seventeenth *April*, 1711, and authorised his executors to sell his real estate, and distribute the proceeds among the children of his four sisters, *Maria*, the wife of *Isaac Depeyster*, *Margaret*, the wife of *Nicholas Evertson*, *Helena*, the wife of *Gaulterius Dubois*, *Rachel Bayard*, the widow of *Petrus Bayard*, and to place the share of *Hannah*, his remaining sister, at interest during her life; for her use, and after her death, to divide it among the other heirs. The testator died without issue. *Rachel Bayard*, one of his sisters, married *Henry Willman*, whom she survived; and she, *Rachel Willman*, after the death of her husband, about the fourteenth *June*, 1746, by her last will, devised the half of all her real estate to her son; and the other half to her daughter, *Elizabeth Willman*, who married *Vincent Matthews*, by whom she had one child, a daughter, born in 1756, who married *Theophilus Beekman*, in *January*, 1783. *Hannah Van Ball*, the unmarried sister of *Henry Van Ball*, died intestate, and without issue, in the life-time of her sister *Rachel*. *Elizabeth*, the wife of *Vincent Matthews*, died the eighteenth *August*, 1764, and *Vincent Matthews* died the twenty-fourth *May*, 1784. *Theophilus Beekman* died about the first *January* in twenty years thereafter, but was protected by the statute during her *coverture*. (a)

(a) *Vide Jackson v. Johnson*, 5 *Cowen*, 74. *Jackson v. Moore*, 6 *Cowen*, 706. *S. C. in error*  
4 *Wendell*, 50.

ary, 1807, and his widow, *Elizabeth Beekman*, is the lessor of the plaintiff.

No evidence was offered that *Rachel*, the sister of *Henry Van Ball*, or her daughter *Elizabeth*, the wife of *Matthews*, or *Theophilus Beekman* and *Elizabeth* his wife, or either of them, ever entered into the premises in question, or had the actual possession thereof; but the same continued *vacant*, from the time of issuing the patent, until in the year 1772, when those under whom the defendant holds, went into possession, under conveyances, which they considered valid, and which were adverse to the title of the lessor, above stated; and the premises have been held by the defendant, and those under whom he claims, ever since 1772, adversely to all others.

\*S. Jones, jun. for the defendant. 1. The adverse possession of the defendant was a complete defence. From 1772 there was an adverse possession for more than twenty-five years, exclusive of the period of the war. This adverse possession, thus clearly proved, is *prima facie* evidence of title. It was shown also, that this possession was taken and held under color of title. The defendant, therefore, will not be lightly disturbed. The lessor must not only make out a clear and perfect title, but must show a legitimate and satisfactory excuse for sleeping on her rights.

2. Then has the lessor shown any legal disability which can save her right of entry, and protect her from the operation of the statute of limitations? We contend that no such disability has been proved. If the lessor was of full age when her right of entry accrued, she was bound to exert it, and cannot avail herself of *coverture*, or any other disability. (Co. Litt. 246. a. b. Litt. s. 403.) If she marries a husband who is regardless of her rights, it is her misfortune; but the *coverture* is no excuse for not entering, as soon as she arrived at age.

The statute (sess. 24, c. 183, s. 3) declares, "that all writs of *scire facias*, &c. shall be sued and taken within twenty years next after the title or cause of action first descended, and not after; and no person shall, at any time hereafter, make any entry into any manors, lands, &c. but within twenty years next after his right or title descended or accrued to the same," &c. "provided, &c. if such person be within the age of twenty-one years, *feme covert*, insane, or imprisoned, such person and his heirs, shall or may, after the said twenty years have expired, bring such action, and make such entry, as they might have done before the expiration of the twenty years, so as such person, within ten years after his death, sue forth such writ, or make such entry, and no time after ten years as aforesaid." [2 R. S. 293. s. 7. Id. 295. s. 14. 16.]

ALBANY,  
August, 1811.

JACKSON  
v.  
SELLICK.

[ \* 264 ]

ALBANY,  
August, 1811.  
JACKSON  
v.  
SELLICK.

The statute does not provide for a second disability, nor can we find a case where a second disability has been allowed. The action must be brought, or \*the entry be made, within twenty years after the right accrues, except in the case of infants, &c. If the right has accrued, and the person is of age, it must be exerted within twenty years. In *Doe v. Jesson*, (6 East, 80,) where an ancestor died seised, leaving a son and a daughter, infants, and a stranger entered, and the son died abroad, within age, it was held that the daughter was not entitled to twenty years after the death of her brother, to make her entry, but only to ten years; more than twenty years in the whole having elapsed since the death of the person last seised. Courts lean against the allowance of successive disabilities; as the time for making an entry might be extended indefinitely, by allowing a second, third, and other disabilities. The effect of the exception in the statute, as to the period of the war, is only to extend the term of limitation to twenty-seven years and five months.

But it may be said, that *Vincent Matthews* was a *tenant by the curtesy*, and not dying until 1784, when the lessor was a *feme covert*, she is protected by the proviso in the statute.

The estate of a *tenant by the curtesy* is *sui generis*, and being in exclusion of the heir, it ought to be taken strictly. It seems to have originated from the feudal notion that there must be a tenant in possession of the land, capable of performing the feudal services; and to compensate the husband for the performance of those services, the law gave him the rents and profits during his life. It is applicable only to lands in full occupation and use, and which yield an annual profit. Such an estate cannot properly exist in wild lands, entirely waste and uncultivated. It is essential to an estate *by the curtesy*, that there should be an *actual seisin* of the land by the wife, or by the husband in right of the wife. A *seisin in law* is not sufficient to entitle the husband to *the curtesy*. (2 Bl. Comm. 127, 128. Co. Litt. 29, 30. a. Perk. s. 457—468, &c. 8 Co. 34. a. 1 Ves. 307. Watk. on Desc. 39. 1 Cru. Dig. tit. 5 c. 1, s. 10, 11, 12, 13, 14. Doct. & Stud. b. 2. c. 1. 5. Keilway, 2.)

[ \*266 ]

There had never been any entry or possession, nor \*even an attempt to enter on the premises, so that *Vincent Matthews* could not be a *tenant by the curtesy*.

3. Again, the lessor has shown no title. By the will of *Henry Van Rall*, the executors were directed to sell the lands and distribute the proceeds. It does not appear from the case, that any sale was ever made. If not, the lands descended to the heirs at law; and it does not distinctly appear who were the heirs at law. If the lessor was one of

the heirs, she can be entitled only to an eighth of the premises.

*P. W. Radcliff* and *D. B. Ogden*, contra. I. The lessor has shown a clear and undoubted title, deduced from government, so as to exclude all question as to any other person. The defendant, then, not the lessor, ought to be held to the greatest strictness.

No doubt the statute is a complete bar, unless we can show that the lessor comes within some of the provisoos or exceptions. The right of entry, we contend, did not accrue until after the death of *Vincent Matthews*, in *May*, 1804, and the lessor, being then a *feme covert*, she had ten years after the death of her husband, in 1807, to bring her action. It is not denied, that if there was a *tenant by the curtesy*, that the statute would not run until after the death of the tenant. Then was *Vincent Matthews* a tenant *by the curtesy*? All the cases cited from the *English* books are applicable only to lands actually tenanted and cultivated. The title of the lessor is deduced from the government, and the land remained entirely vacant until 1772. Why is an actual entry or seisin required by the *English* law? It is to give notoriety to the possession, or notice to the vicinage. But for what purpose should the owner go into the wilderness, fifty or a hundred miles remote from any human habitation, and declare his intent? The law can never require so idle and useless a ceremony.

In *England*, an action of *trespass* will not lie on a seisin \*in law before entry. (*Gilb. on Ten.* 45, (4th edit.) and note 30. *3 Bl. Comm.* 210.) But this court has held, that trespass will lie against an intruder on wild land, without an actual entry by the owner. This must be on the principle, that in regard to wild lands, the possession is held to be in the person having the right. When the law presumes the possession, it is considered as an *actual possession*, so as to transmit the inheritance.

Where, on the death of *S.* an estate-tail descended to his sister *A.* who was married and had issue, it was held that the husband of *A.* was entitled to be a tenant by the curtesy. (*3 Atk.* 469. *Cruise*, tit. 5. c. 1. s. 13, 14. *Co. Litt.* 15. a. *3 Wils. Rep.* 521. *7 Term Rep.* 390. *8 Term Rep.* 213. *Watk. Law of Desc.* 27, 28, 82, 83.) Where lands are held under a lease, the heir is considered as having a seisin in deed, before entry or receipt of rent; because the possession of the lessee is his possession. An entry by the husband is not necessary to entitle him to the tenancy by curtesy. (*Cruise*, tit. 5. c. 2. s. 30. *Watk. on Desc.* 82.) The wife being in

ALBANY,  
August, 1811.

JACKSON  
v.  
SELLICK.

[ \* 267 ]

ALBANY.  
August, 1811.

JACKSON  
v.  
SELLICK.

possession, the law adjudges the *seisin* to be in the husband, immediately on her death. By the birth of a daughter (the lessor) in 1756, *Vincent Matthews* became a *tenant by the curtesy* initiate; and his estate was complete on the death of Mrs. *Matthews* in 1764, and there could be no right of entry, until after his death in 1784.

The statute of limitations being in restraint of a prior right, the restraining part ought to be construed strictly, and the exceptions liberally expounded. On the construction contended for by the defendant, a *feme covert* dying within one year after the commencement of the disability, leaving an infant, such infant, though under age, would be bound to assert its right in 10 years after the death of the mother, or the removal of the disability. There must, then, be a second disability allowed, otherwise the obvious intent of the statute, which was to give the infant 10 years, after arriving at full age, would be defeated.

The statute proceeds on the ground of *laches* in the person having the right of entry. Now, this *laches* can never be imputed to an *infant* or *feme covert*.

[\* 268]

\*Until 1772, the land was vacant, and the lessor an infant. The provision of the statute does not apply to an adverse possession taken against an infant, or person under a legal disability.

*Jones*, in reply, said, he admitted that possession follows the right, where there is no adverse possession; that is, the legal *seisin* or possession, which has the beneficial consequences stated, as to transmitting the inheritance, or in regard to leases and conveyances by bargain and sale. But the case of a tenancy by the *curtesy*, is an exception to the general rule, and requires an *actual*, as distinguished from a *legal* *seisin*. *Watkins*, in his *Treatise on the Law of Descents*, (*Wat. on Desc.* 38,) lays it down, that "if hereditaments descend to a daughter, and such heiress *has* a *seisin* in law, unrebuted by another *seisin*, yet such *seisin* in law will *not* entitle the husband to the *curtesy*." But a widow may claim her dower, where her husband has only a *seisin* in law, and he dies before entry. (*Wat. on Desc.* 32.)

Possession follows the right in regard to wild lands, for every purpose except that of a tenancy by the *curtesy*; but it is this peculiar estate, which is not to be favored, in which the law requires an *actual seisin*.

The land is situated near *Goshen*, an old settled town; *Vincent Matthews* might have entered and improved in 1764. There was an entry and partition made in 1715. It was, in fact, settled and improved by the defendant and others, in 1772.

The statute says, no entry shall be made, &c. until 20 years after the right or title descended or accrued. Now the *right accrues* whenever a person becomes possessed of a right of entry. Mrs. *Matthews* had a *seisin* in law, until 1772, when she was divested of that *seisin*, and driven to her right of entry.

ALBANY,  
August, 1811.  
JACKSON  
v.  
SELLICK.

\*KENT, Ch. J. delivered the opinion of the court. The defence, in this cause, turns wholly upon the question, whether the right of recovery is not barred by the statute of limitations.

[\* 269]

The lessor of the plaintiff was an infant when the adverse possession began, in the year 1772. But admitting that the father, *Vincent Matthews*, was tenant by the *curtesy*, there was then a particular estate for life in the premises existing, and no right of entry had descended, or could vest in her, during the continuance of that estate. It was declared, in *Jackson v. Schoonmaker*, (4 *Johns. Rep.* 390,) to be the law, that the statute of limitations did not affect the right of a remainder-man during the continuance of a particular estate; nor would the acts or *laches* of the tenant of the particular estate, affect the party entitled in remainder. The right of entry of the lessor did not accrue, and could not exist during the estate by the *curtesy*. That estate ceased by the death of *Matthews*, in 1784, and had she been under no disability, she would then have been bound to have brought the suit within 20 years thereafter, but she was at that time a *feme covert*, and protected from the statute of limitations, by the proviso in favor of the disability of *coverture*. (*Laws*, vol. 1. 563. [2 *R. S.* 295. s. 16.]) This is not a case of cumulative or successive disabilities, and we, at present, have no concern with any question to which they might give rise. The *coverture* was the *first* and only disability existing, when her right of entry accrued, and that is expressly saved by the statute.

There is no bar to the plaintiff's right of recovery, under the statute of limitations, provided her father was a tenant by the *curtesy*, and this is the next and only real point in the case.

There was no *pedis possessio*, or possession in fact, of the premises, in the popular sense of the words, by either *Matthews* or his wife, during the *coverture*; for the lands continued vacant, or remained as new lands, wild and \*uncultivated, from the date of the patent in 1704, to the time of the commencement of the adverse possession in 1772. The title under the patent to an undivided eighth part of the premises, clearly existed in *Matthews's* wife. She derived it by will from her mother, who was one of the four coheirs of *Henry*

[\* 270]

ALBANY,  
August, 1811.

JACKSON  
v.  
SEELICK.

*Van Ball.* The question is, was she not to be considered as seised in fact of these premises, so as to enable her husband to become a tenant by the courtesy? To deny this, would be extinguishing the title of tenant by the courtesy, to all wild and uncultivated land. It has long been a settled point, that the owner of such lands is to be deemed in possession, so as to maintain trespass. The possession of such property follows the title, and so continues, until an adverse possession is clearly made out. This is the uniform doctrine of this court; and there is no reason why the same rule should not apply when the title by courtesy is in question. To require the actual occupation of such lands, during the coverture, would be an unreasonable, if not an impracticable requisition. The general language of the *English* cases is, that there must have been actual entry, but the rule had reference to enclosed or cultivated lands. We must take the rule with such a construction as the peculiar state of new lands in this country requires; and this may be done without any departure from the spirit and substance of the *English* law. Some of the old books would not allow the courtesy, without actual entry upon the lands, even though it appeared to have been impossible for the husband, with the utmost diligence, to have made the entry during the coverture. (*Perkins*, 470. *Doct. & Stud. Dial.* 2. c. 15.) But Lord *Coke* talks more reasonably. He says, that if a man seised of an advowson, or rent in fee, has issue a daughter, who is married and has issue, and he then dies seised, and the wife, before the rent became due, or the church became void, dies, she had but a seisin in law, and yet her husband shall be a tenant by the courtesy, because he could by no industry attain to any other seisin. *Et impotentia excusat legem.* (*Co. Litt.* 29. a.) The letter of the rule was very much relaxed by Lord *Hardwicke*. In *De Grey v. Richardson*, (3 *Atk.* 469,) he allowed the courtesy in lands on which, when they descended to the wife, there were leases for years existing, and a rent incurred which remained due during three months of the coverture, and into which lands she made no entry, nor received any payment during her life. He professed to decide the case, as a question of law, and said that this was such a possession in the wife, as made the husband tenant by the courtesy. In another case before Lord *Hardwicke*, of *Sterling v. Penlington*, (7 *Viner*, 149. pl. 11,) he allowed this title, when the wife had been, in fact, denied possession during the coverture, by a tenant in common, who supposed, through mistake, that the wife's right, as heir, had not then accrued.

These cases are as strong as the present, and prove that actual entry, or *pedis possessio*, is not absolutely requisite,

and that if the party is constructively seized in fact, it will be sufficient.

The court are accordingly of opinion, that the plaintiff is entitled to recover one undivided eighth part of the premises.

ALBANY,  
August, 1811.

HALLET  
v.  
COL. INS. CO.

Judgment for the plaintiff.

\*HALLET against THE COLUMBIAN INSURANCE COMPANY.

[ \* 272 ]

THIS was an action on a policy of insurance, on a cargo laden on board a vessel, called the *Cornelia*, on a voyage at and from *New-York* to *St. Thomas*. The policy was dated 20th *January*, 1807. The declaration was for a total loss, by *barratry* of the master. Plea *non assumpsit*.

The cause was tried at the *New-York* sittings, in *December*, 1810, before the *Chief Justice*.

The policy and interest of the plaintiff were admitted. From the testimony of the mate, it appeared that the vessel sailed from *New-York*, about the 19th *January*, 1807, on the voyage insured. They experienced bad weather, and were obliged to throw overboard some part of the cargo, being two casks of hardware, and one cask of nails, and some codfish and cheese. Having fallen to leeward of *St. Thomas*, the master, on coming off *St. Juan*, in the island of *Porto Rico*, declared his intention to put into that port, and accordingly went in there, on the 5th of *January*, 1807. The vessel might have easily beat up to *St. Thomas*, and would have probably reached that island the next day. The cargo which consisted of hardware and provisions, shipped by different persons, was landed, and was in good order; some repairs were made to the vessel, which did not cost more than 100 dollars; the cargo might easily have been carried to *St. Thomas*; the two islands being near each other, separated only by a narrow passage; and there was a daily intercourse between them by boats and vessels. The cargo was left at *St. Juan*, and the vessel was afterwards sold there, and *King*, the master, continued to have charge of her, and went in her a voyage to *St. Croix*, and from thence to *St. Thomas*, from

*A.*, the owner of a vessel, by a charter-party, let the whole vessel to *B.*, the master, for 4 months, and *B.* covenanted to virtual and man the vessel at his own cost.

Goods were shipped by different persons, for *St. Thomas*, but the master, instead of going to *St. Thomas*, went to *Porto Rico*, and there disposed of the cargo, and the vessel was sold.

*C.*, a shipper of goods, brought an action on a policy of insurance, for a total loss, by *barratry* of the master. It was held, that the master was owner *pro hac vice*, and though his conduct was in itself *barratry*, yet being owner for the voyage, it did not amount to *barratry*; and the insurers were, therefore,

not liable. The rule of law is general, and is applied as well to the innocent owner of goods, as to the owner of the ship, who consents to the fraud of the master. (a)

(a) *Mercedier v. Chesapeake Ins. Co.* 8 *Cranch*, 39. But *barratry* may be committed by the master in respect to the cargo, though the owner of the cargo is at the same time the owner of the ship, and though the master is also the supercargo or consignee for the voyage. *Cook v. Commercial Ins. Co.* 11 *Johns. Rep.* 40.

ALBANY,  
August, 1811.

HALLET  
v.  
COL. INS. CO.

whence she returned to *St. Juan*, and afterwards made several voyages between the *West India* islands and the *Spanish Main*.

From the depositions of the consignees of the goods of the plaintiff, taken at *St. Thomas*, it appeared, that they received a letter from the plaintiff, dated the 15th *January*, 1807, mentioning that he should make a shipment to them by the *Cornelia*, to sail in five days, of about 200 barrels of flour, &c. but they heard nothing of the vessel, except from report, (which was, that the *Cornelia* had put into *St. Juan* in distress, and the vessel, after being surveyed, was condemned and sold, and purchased by the master and repaired,) until she arrived at *St. Thomas* from *St. Croix*, in ballast, when the consignees applied to the master, and demanded the goods consigned to them by the plaintiff, and the master answered that the vessel during her voyage from *New-York*, was in such distress, that he had been obliged, for the preservation of the lives of himself and crew, to throw the goods overboard ; the vessel left *St. Thomas* for *Curracao*.

The defendants produced in evidence a *charter party* dated the 17th *December*, 1806, made between *Dunstan* and *Denniston Wood*, owners of the sloop *Cornelia*, and *William King*, master, by which the owners granted and let to freight the said vessel to the master, from the date, for and during such time as the master might choose to employ her, provided it should not exceed four months, for and at the rate of 153 dollars per month : and the owners covenanted to put the vessel in good repair, and keep her in repair, during the time she was employed by the master, at their own cost, and that the vessel should be at the risk of the owners, during all the time ; and the master was allowed until the 7th *April*, 1807, to pay the hire of the vessel, unless she should, before that time, be delivered up to the owners, or lost. And in consideration of the premises, the master covenanted to take and employ the vessel on the terms mentioned, and to \*“*victual and man her at his own cost and charges, until she should be delivered back to the owners, or be lost* ;” and that he would pay for the use of the said vessel, at the rate of 153 dollars per month, &c.

The judge charged the jury, that if they believed the conduct of the master amounted to *barratry*, and he thought it did, to find a verdict for the plaintiff for a total loss ; and the jury found a verdict for the plaintiff, for a total loss.

A motion was made to set aside the verdict, and for a new trial.

*S. Jones*, jun. and *C. I. Bogert*, for the defendants, contended, that the master was owner of the vessel, *pro hac vice*.

and, as such owner, could not commit *barratry*, which is an act committed by the master or mariners, for a fraudulent or unlawful purpose, contrary to their duty to their owners. Where there is an absolute letting to hire, and the hirer pays the master and crew, and has the complete control of the vessel, he is considered as owner, *pro hac vice*. In *McIntyre v. Brown*, (1 *Johns. Rep.* 229, *Coup.* 143,) the court considered these circumstances as decisive of the ownership for the voyage. If the same person be both owner and master, he cannot commit *barratry*. If the owner assents to the act of the master, it is not *barratry*; (*Marsh. on Ins.* 528. 1 *Term Rep.* 327. 3 *Caines*, 1. 4 *Term Rep.* 33;) and the shipper of the goods must resort to his action against the master or ship-owner for the fraud.

ALBANY,  
August, 1811.  
HALLET  
v.  
COL. INS. CO.

*Wells*, contra, insisted, that the present case was distinguishable from those which had been cited, and that the general rule about *barratry* was not applicable. The plaintiff is an innocent shipper of goods, and cannot be considered as consenting to the act of the master, nor ought he to be affected by his acts, or the conduct of the owner *pro hac vice*. Suppose the owner of the goods should assent to the *barratry*, and the owner of the vessel does not consent; then the owner of the goods <sup>[\* 275]</sup> might, *nevertheless*, recover for the *barratry*, if it is to be considered as an act done against the owner of the vessel only.

The true principle is, that a party cannot recover on the ground of an act of *barratry*, to which he has consented; but if committed without his consent, he may recover. *Millar*, (*Millar on Ins.* 165. 167,) in his *Treatise on Insurance*, vindicates this distinction, though it must be admitted that the decisions in the *English* courts are against it. But in *Kendrick v. Delafield*, (2 *Caines*, 67. 73,) the present *Chief Justice* seemed to think it a question still undecided and open, whether *barratry*, with the concurrence of the owners of the vessel, would exempt the insurer of goods belonging to an innocent shipper. Should the question not be authoritatively settled, it will not be difficult to show that the reason of the rule that the owner of the ship cannot recover for *barratry* to which he has consented, does not apply to an innocent shipper of goods.

Though an ownership *pro hac vice*, is, in many cases, deemed equivalent to an absolute ownership; yet this doctrine ought to be laid down with this limitation, that he is to be considered owner, as far as the persons dealing with him know the nature of the ownership. It ought not to apply to an innocent shipper of goods, who is wholly ignorant of the nature of the ownership, or whether it is absolute or temporary.

ALBANY,  
August, 1811.

HALLET  
v.  
COL. INS. CO.

[\* 276]

The plaintiff never heard of the charter party until it was produced at the trial. The owner of a ship ought not to be permitted to hold himself out as owner, and afterwards, by transferring the ship to the master for the voyage, avoid all responsibility as owner, and leave the shipper of goods to look to the master, who may never return, or be insolvent. In that way the owner of the vessel may concert with the master, to defraud the owner of the goods, by letting the vessel to the master, with a view to his committing *barratry*, or running away with the goods. The owner of the goods cannot recover against the insurer; and if \*he sues the owner of the ship, he will answer that she was let to the master, who was owner *pro hac vice*, and is the only person responsible.

*Per Curiam.* The master of the vessel was to be considered as owner *pro hac vice*, or for the voyage insured. There was a complete letting of the entire vessel for the voyage. The master was to victual and man her at his own cost. He had the whole management and control, and according to the principle established, or admitted, in the cases of *Velleijo v. Wheeler*, (C. 142,) *M'Intyre v. Bowne*, (1 *Johns. Rep.* 229,) and *James v. Jones*, (3 *Esp. N. P.* 27,) the person having such an interest and authority in the ship, is regarded as the temporary owner. There is no doubt that the master's conduct was fraudulent and amounted to *barratry*, provided that *barratry* could be committed in the situation in which he stood. But it appears to be perfectly well settled, that if the master of the ship be at the same time the owner, he cannot commit *barratry*, because *barratry* can only be committed by the master or mariners in relation to the owner of the ship.

He may, as owner of the ship, make himself liable, by his fraudulent conduct, to the owner of the goods, but not as for *barratry*. (*Lewin v. Suasso, Marsh.* 528. note. *Nutt v. Bordieu*, 1 *Term Rep.* 823.) It has been suggested that the reason of the rule is, that no man shall be allowed to derive a benefit from his own crime, which he would do were he to recover against the insurer for a loss occasioned by his own act; and that to make the reason of the rule apply, the master should have been owner of the goods. The answer to this is, that a rule of commercial law, when once settled, ought not to be disturbed, even though the reason of it may be justly questioned. Uniformity of decision is of more importance in such cases than accuracy of reasoning. That the insurer should be held responsible in any case to the owner, for the fraud \*of the master, (who is the owner's agent,) has been deemed a strange and unreasonable part of the *English* law of insurance; (1 *Term Rep.* 330. 1 *Emerig.* 370. 2 *Johns. Cas.* 188;) and when we find such responsibility limited, as

[\* 277]

in this case, we ought not readily to extend it, merely for the sake of giving more consistency to the rule. As far as the authorities have carried the insurer's responsibility for *barretry*, so far we ought to go, but no further.

The motion, therefore, for a new trial ought to be granted, with costs, to abide the event.

ALBANY,  
August, 1811.

CORP  
v.  
UNITED INS  
Co

**CORP and others against THE UNITED INSURANCE COMPANY.**

**SAME against THE SAME.**

**SAME against THE PHÆNIX INSURANCE COMPANY.**

THESE were actions on three separate policies of insurance. The first was dated the thirty-first of *October*, 1807, upon certain articles, (eight thousand seven hundred and fifty pieces of nankeens,) specified in the policy, as part of the cargo of the ship *Hero*, *Barnard*, master, valued at the sum insured, at \* and from *New-York* to *Leghorn*, at a premium of five *per cent.*

From the deposition of the master, the following facts appeared: The ship sailed about the first of *November*, 1807, on the voyage insured. On the ninth of *January*, 1808, the *Hero* was boarded by a *British* vessel of war, the commander of which obliged the master to exhibit the ship's papers, and endorsed her register as follows: "His *B. M.* sloop *Grasshopper*, ninth of *January*, 1808. Pursuant to His *Britannic* Majesty's orders in council, you are hereby warned to discontinue your voyage to the port of *Leghorn*, upon pain of confiscation of ship and cargo, if found disobeying the above-mentioned order. And you are, pursuant to further orders from

Insurance from  
*New-York* to  
*Leghorn*. The  
vessel sailed  
from *New-York*  
the first of *Nov-*  
*ember*, 1807.

[ \* 278 ]

On the ninth of  
*January*, 1808,  
within the  
*Straits*, and  
about 60 or 70  
leagues from  
*Leghorn*, the  
vessel was  
boarded by a  
*British* vesel  
of war, the com-  
mander of  
which endorsed  
her register,  
warning her not to  
proceed to  
*Leghorn*, nor to  
any port of  
*France* or

*Spain*, *Portugal*, *Holland*, *Denmark*, *Tuscany*, *Naples*, *Ragusa*, the republic of the *Seven Islands*, or to any other country at war with *Great Britain*, or from which the *British* flag was excluded, under pain of being confiscated, such ports being declared to be in a state of blockade, by the *British* orders in council of the 11th of *November*, 1807, and the vessel was warned not to proceed to any such ports, without first stopping at a *British* port.

The vessel put into *Gibraltar*, where the captain was informed of the *French* and *Spanish* *decrees*, and was refused a clearance to any but a *British* port. Under these circumstances, and fearing a capture, in case he proceeded to any port in the *Mediterranean*, the captain took a clearance for *Famouli* and sailed for that place under *British* convoy, where he arrived on the twenty-third of *March*, 1808. The insured abandoned for a total loss; and it was held that neither the fear of capture and condemnation, nor the circumstances in which the vessel was placed, afforded a *justifiable cause* for abandoning the voyage, and that the insurers were discharged.

The endorsement on the register, and warning by the *British* cruiser, was not an act of *search*, or a *visit*, within the true construction of the *Milan* and *Aranfuez* *decrees*, or the law of nations; nor was the vessel under the *restraint of princes* at *Gibraltar*, a clearance not being essential, and the threat of *British* capture did not amount to such a restraint (a)

(a) *Vide King v. Delaware Ins. Co.* 6 *Cranch*, 11. *Sulcus v. United Ins. Co.* 15 *Johns. Rep.* 523.

ALBANY,  
August, 1811.  
Corp  
v.  
UNITED INS.  
Co.

[ \* 279 ]

his said Majesty, hereby informed, that if you are found proceeding to any port or place of *France* or *Spain*, *Portugal*, *Holland*, *Denmark*, *Tuscany*, *Naples*, *Ragusa*, or the islands lately composing the republic of the *Seven Islands*, or any other country at war with His *Britannic* Majesty, or from which, though not at war with his said Majesty, the *British* flag is excluded, your ship and cargo will be confiscated as lawful prize to the captors, the above-mentioned ports being declared in a state of blockade. The commander of the *British* ship, at the same time, informed the master of the *Hero*, that in consequence of the orders in council, she would not be permitted to proceed to *Leghorn*, or any of the ports mentioned in the endorsement on the register, without first stopping at some *British* port, and that if she attempted to proceed to any of the said ports, both ship and cargo would be liable to be captured by any *British* vessel of war, and condemned as good prize. The master of the *Hero*, under these circumstances, deemed it his duty, and for the interest of all concerned, to touch at *Gibraltar*, that being the nearest *English* port, and accordingly arrived at *Gibraltar*, with the ship and cargo, on the eleventh\* of *January*, 1808, where she was subjected to quarantine, until the twenty-fourth of *January*. He found at *Gibraltar* twenty or thirty sail of *American* vessels bound up the *Mediterranean*, many of whom had stopped there, in consequence of having their registers endorsed, and being warned by *British* cruisers. That about the twelfth of *January*, the master received intelligence of certain *decrees* (*Milan* and *Aranjuez*) of the *French* and *Spanish* governments, declaring that any neutral vessel which should suffer herself to be stopped or visited by an *English* ship or vessel, or should have submitted to put into an *English* port, or should pay any imposition to the *English* government or its officers, should thereby lose its national character, be no longer protected by her flag, and be considered as *British* property; and that if any such vessel, after having thus lost her national character, should enter the harbors of *France* or *Spain*, or their allies, or fall into the hands of the *French* or *Spanish*, she should be good and lawful prize. These *decrees* were published in the gazette at *Gibraltar*. The master believing that in consequence of these *decrees*, and the number of *French* and *Spanish* cruisers in the *Mediterranean*, the *Hero*, if she proceeded on her voyage, would certainly be captured and condemned, determined, after taking the best advice, to abandon the voyage to *Leghorn*, and return with the ship and cargo to *New-York*. He accordingly applied to the officers of the government at *Gibraltar*, for a clearance to the *United States*, which was refused; and he was informed by the officers of the govern-

ment, that no *American* vessel would be permitted to clear or depart from *Gibraltar* for any but a *British* port. Not being able, with the intercession of the *American* consul, to obtain a clearance for the *United States*, the master determined to take a clearance for *Falmouth*, in *England*; hoping, after he had obtained his clearance for *Falmouth*, in *England*, and departed from *Gibraltar*, he should not be intercepted by any *British* cruiser, \*but be allowed to proceed to the *United States*. In order, however, to ascertain whether he should be interrupted, if found proceeding to the *United States*, with the clearance for *Falmouth*, the master, on the twenty-eighth of *February*, 1808, applied to the commander of a *British* man-of-war, the *Windsor Castle*, lying in *Gibraltar*, and stated that he had obtained a clearance for *Falmouth*, and desired to know if he would be interrupted by *British* cruisers, if he attempted, after leaving *Gibraltar*, to proceed to the *United States*. He was informed by the *British* commander, that if he attempted to proceed from *Gibraltar*, for any but a *British* port, he would be liable to be captured by any *British* cruiser, and condemned. The master, under these circumstances, and with the advice of the *American* consul, set sail on the twenty-ninth *February*, 1808, from *Gibraltar*, under convoy of a *British* vessel of war, for *England*. During the voyage, the vessels under convoy were chased, on the seventeenth of *March*, by two *French* frigates, when the convoy made a signal for the vessels, under her charge, to part, and make the best of their way to the port of destination. The *Hero* accordingly parted from the convoy, and arrived at *Falmouth*, in *England*, on the twenty-third of *March*.

The master further deposed, that it was solely the fear of capture and condemnation, in proceeding to the port of *Leghorn*, or to any other port in the *Mediterranean*, which induced him to break up the voyage, and not attempt to proceed to any port in the *Mediterranean*, and that in every thing relative to the ship and cargo, and the intended voyage, he acted with the best advice, and solely for the interest of all concerned.

On his cross-examination, the master stated that when he was boarded by the *Grasshopper*, he was within the *Straits*, and about sixty or seventy leagues from *Leghorn*, and after his register was endorsed, he was verbally directed by the commander to touch at *Gibraltar* before he pursued his voyage; that at the time he was boarded, he had \*been beating for several days against a *Levanter*, an easterly wind prevailing in that sea, which continued several days after his arrival at *Gibraltar*; and that had he been left to pursue his voyage, it would have taken ten or twelve days to reach *Leg-*

ALBANY,  
August, 1811.  
CORP  
v.  
UNITED INS.  
Co.

[ \* 280 ]

[ \* 281 ]

ALBANY,  
August, 1811.  
v.  
UNITED INS.  
Co.

*horn*, during which time he could not have failed to have fallen in with *French* and *Spanish*, as well as *British* cruisers.

It was admitted, that the plaintiff had made due proof of interest, and had duly abandoned. The *British* orders in council of the eleventh of *November*, 1807, the *Milan* decree of the twenty-fifth of *December*, 1807, and the *Aranjuez* decree of the third of *January*, 1808, were read in evidence.

The policies in the first two causes contained the following written clauses: "Warranted *American* property; proof whereof, if required, to be made here only. In case of capture or detention, not to abandon in less than six months after advice thereof at this office, or until after condemnation. If turned away for attempting a blockaded port, the assured to be at liberty to proceed to a port not blockaded."

In the third cause, the policy contained the following written clause: "Warranted *American* property; proof to be required here only. Also warranted not to abandon, if detained or captured, until after detention of six months, unless previously condemned, nor if refused admittance, or turned away, but may proceed to another near open port."

A verdict was taken for the plaintiff for a total loss, with liberty to either party to turn the case into a special verdict. The other two causes being similar, it was agreed that they should abide the event of the first.

A motion was made to set aside the verdict, and for a new trial.

[\* 282]

*Colden*, for the plaintiff. Most of the points arising in this case, were decided in the case of *Craig v. The United Insurance Company*. (6 *Johns. Rep.* 226.) There are some facts, however, which distinguish the present from that case. The terms of the endorsement on the register of the *Hero*, are much stronger, and more comprehensive, than those used in the case of the *Amiable Matilda*. The going into *Gibraltar* was justifiable. This was not questioned in *Craig v. The United Insurance Company*. After the arrival of the *Hero* in that port, she was under continual restraint by the *British* government. She was refused a clearance to any but a *British* port; and, after obtaining a clearance, the master was informed that he would be captured and condemned, if he attempted to return to the *United States*. The ground of abandonment is a *restraint of princes*, not the fear of capture.

Again, there was a justifiable cause for abandoning the voyage, on the ground of the port of destination being shut. It is admitted that the plaintiffs have duly abandoned for a total loss; that is, for whatever was a justifiable cause.

*Hoffman* and *T. A. Emmet*. Every point that can arise in this cause has already been decided in the cases of *Craig v. The United Insurance Company*, and *Tenet v. The Phoenix Insurance Company*. (7 *Johns. Rep.* 363.) There is no substantial difference between this case and that of *Craig v. The United Insurance Company*.

ALB. NY.  
Aug 4, 1811.  
C. R. P.  
v.  
UNITED INS.  
CO.

The clause in the policy had reference to the turning away from a blockaded port, not to the new practice of turning away under orders of council. The clause provides that in case the port of destination is blockaded, the insured may be at liberty to go to a port not blockaded. There is no evidence that *Leghorn* was, in fact, blockaded. If not, the master ought to have proceeded. If *Leghorn* was blockaded, then he ought to have gone to a port not blockaded. But the master elected to go into *Gibraltar*. He was not compelled to go in there; he had passed that port, and he returned. The neutral is \*not bound to obey the orders of a belligerent, unless the belligerent has a right, by the law of nations, to order. There was no prohibition as to the ports in the *Ecclesiastical States*, in *Italy*; the *British* flag was not excluded from any places within the papal territories. The *Hero* might, then, have proceeded to *Civita Vecchia*. A head wind or *Levanter* was no excuse for not proceeding there, or to the nearest open port to *Leghorn*. She might have gone to *Messina*; the *French* have never occupied the island of *Sicily*. Why not go to *Malta*? If she had gone to *Malta*, she might have left it before hearing of the *French* and *Spanish* decrees. We say, then, on the principle of the decision in the case of *Tenet v. The Phoenix Insurance Company*, the going into *Gibraltar* was a deviation. The vessel lay in that port a month after the expiration of her *quarantine*, without any cause assigned for the delay.

If she rightfully went into *Gibraltar*, then the policy by the *United Insurance Company* was at an end; for the clause does not protect her in going to more than one port not blockaded. If the words "near open port," mean the nearest port geographically, and all the ports in the *Mediterranean*, except *Gibraltar*, were shut, then that was the nearest open port, and the policy by the *Phoenix Insurance Company* ended there.

It is said that after the *Hero* arrived at *Gibraltar*, she was under restraint; but there was no restraint, except the refusal of a clearance to any other than a *British* port. A clearance is matter of form. It is the common practice to take a clearance for one port and go to another. After clearing for *England*, she might, when at sea, have gone where she pleased. Then why not go to *Leghorn* or the *United States*? The master states the reason; a *fear of capture* by the *English*.

[\* 283]

ALBANY,  
August, 1811.

Corp.  
/.  
UNITED INS.  
Co.

The case then comes precisely to that of *Craig v. The United Insurance Company*.

\*Again, we may say, if all the ports were shut, except *Falmouth*, or a port in *England*, then *Falmouth* became the *neareſt, open port*, and the voyage ended there.

*Harison*, in reply. We do not mean to controvert the case of *Craig v. The United Insurance Company*, but we contend that this case is distinguishable from it.

The clauses in these policies were not inserted with a view to the circumstances which actually took place. If, then, as has been said, they did not refer to the orders in council, the case must be decided as if no such clauses had been inserted.

Admitting that the endorsement on the register, and all the acts of the *British* officers, were against the law of nations, and unauthorized, still the master is to be considered under the restraint and coercion of princes or powers. It is true, the master of the *Hero* was not bound to obey; but as he was unable to resist *British* capture, he was under coercion and restraint. Had he attempted to have gone to *Civita Vecchia*, he would have been liable to seizure by the *British*. Under the new and unforeseen circumstances which took place, the going into *Gibraltar* was an act of necessity and prudence, and perfectly justifiable.

The *Hero* could not go to *Leghorn* without being seized. Had she attempted to sail from *Gibraltar* without a clearance, she would have been liable to seizure; and if, after her departure, with a clearance, she had steered a different course than that which was in the rout to the port in her clearance, she would have been seized. *Falmouth* was a port of necessity, not of choice. Being under convoy for that port, she was compelled to proceed to *Falmouth*. The voyage was not abandoned *quia timet* merely; but there was an actual interposition of power and force, which amounts to a restraint of princes, within the terms of the policy.

[\*285]

\**VAN NESS, J.* This case cannot be materially distinguishable from that of *Craig v. The United Insurance Company*: (6 *Johns. Report*, 226.) The voyage was voluntarily abandoned at *Gibraltar*, from fear of capture by *French* and *Spanish* cruisers, if the ship proceeded on her voyage to *Leghorn*. This is stated by the captain to have been the cause of breaking up the voyage; and it is a clear and well settled principle in the law of insurance, that the fear of loss is not the loss itself, and is no justifiable cause for abandonment. Nor was the apprehension of seizure and confiscation at *Leghorn*, under the *Milan* decree, (if any such apprehension existed,) sufficient to create a loss of the voyage. There

s no evidence in the case that *Leghorn* was blockaded, or that neutral trade with that port was interdicted; and it was, at least, very doubtful, notwithstanding the decree, whether the ship in question could not have safely entered and discharged her cargo at *Leghorn*. She had not "submitted to be searched," within any just and equitable construction of the *Milan* decree; for the object in boarding her, by the *British* cruiser, appears in this case, as it did in the case of the *Amiable Matilda*, (*Craig v. The United Insurance Company*,) to have been only to warn the vessel not to enter any port in *France*, or of her allies. The *British* cruisers were directed by the orders in council of the 11th November, 1807, to give such warning. If the belligerent *right of search* had been exercised in this case, the fact would undoubtedly have appeared in a more explicit and decided manner. The warning or notice according to the endorsement on the register, is the only evidence we have of the object of the visit, and that object the *British* vessels of war were at that time bound to pursue, in all cases, though no search might have been intended or required. If being boarded and warned brought the ship within the *Milan* decree, it might with equal propriety have been deemed so, if the ship had only been hailed at a distance, and interrogated and warned not to proceed. \*The calling for the papers appears to have been only for the purpose of making the endorsement, so as to leave fixed and conclusive proof of the fact of *notice*. No other motive appears, or is left to be inferred. The captain states no fact of any interrogation or inquiry in relation to *search*, nor what papers in particular were produced. The words of the *Milan* decree, in order to check its severity as much as possible, are to be taken in the strictest sense, as referring to an actual and perfect exercise of the right of search into the character and quality of the neutral vessel, and her cargo; and we are to presume that all maritime tribunals would have given them that construction. The plaintiffs, then, had no right to break up the voyage, and throw the loss of it upon the insurers, if the peril of loss at *Leghorn* rested (as most clearly it did) in mere apprehension and uncertainty.

Nor can the vessel be considered as under the "restraint of princes," while at *Gibraltar*. She was at liberty to depart when she pleased. No clearance was requisite. The captain was only threatened with danger of capture from *British* cruisers, if he proceeded to any other than a *British* port. This was a mere *threat*, without any legal authority to support it. There was nothing to hinder the ship from returning to *America*.

There was no present or existing restraint. The captain was only menaced with danger *in transitu*. The voyage to

ALBANY,  
August, 1811.  
Corp  
v.  
UNITED INS.  
Co.

\* [ § 36 ]

ALBANY,  
August, 1811.

CLEMENT  
v.  
CROSSMAN.

[ \* 287 ]

*Leghorn* was, therefore, voluntarily abandoned at *Gibraltar*, and the voyage to *England* voluntarily undertaken, from mere prudential considerations, with which the insurer had no concern. When the voyage to *Leghorn* was broken up, without any justifiable cause of abandonment, the defendants were discharged, and the sailing to *England* was the commencement of a new voyage.

The plaintiffs have not, therefore, shown a right to recover; and it has become unnecessary to decide another point raised upon the argument, which was, whether the return of the ship from the *Mediterranean* to *Gibraltar* was, or was not, a justifiable deviation under the circumstances in which the ship was placed. It was, at least, a very extraordinary cause of deviation, and it would be difficult to maintain that the cause assigned for it was sufficient. I am, therefore, of opinion, that the defendants are entitled to judgment.

KENT, Ch. J. THOMPSON, J. SPENCER, J. and YATES, J. were also of the same opinion.

Judgment for the defendants.

### CLEMENT against CROSSMAN.

IN error, from the Court of Common Pleas of *Genessee* county. A judgment was obtained by *Crossman*, the defendant in error, against *Clement*, in the court below, in *June*, 1808, on which a writ of error was brought, and a judgment of reversal by default, for not joining in error, was obtained in this court, in *August* term, 1810.

A motion was now made, in behalf of the defendant in error, to set aside the judgment of reversal, which was submitted to the court, on affidavits.

The attorney of the defendant in error swore, that he was attorney for the plaintiff in the court below, and prosecuted him personally, either by delivering the same to him, or leaving them at his dwelling house, or in such other mode, as the court might specially direct, under the circumstances of the case. (a)

A service of the notice, by affixing it up in the clerk's office, is not sufficient.

Though a party had not a regular notice in writing of a writ of error being brought, or of a judgment of reversal; yet if he was informed and sufficiently apprised of the pendency of the writ of error, to have pleaded in time, and of the judgment of reversal, by default, in season to have moved the court, at a former term, to set it aside, it is a *laches*, and the judgment will not be set aside, after a term has so intervened.

(a) Where no attorney is employed by defendant in error on a *certiorari*, the assignment of errors need not be served at the party: it is sufficient to serve a notice to join in *ex eos*. *Verney v. Benedict*, infra, 360.

he suit for him to judgment; that he is not an attorney of this court; and never received any notice of the writ of error being brought, nor any notice of a rule to join in error. The defendant in error also swore, that he never received any notice of a writ of error brought \*on the said judgment, nor any notice of a rule to join in error in this cause; that he had lately been informed of the judgment of reversal obtained in this court, but not in time to make an application to set it aside before the present term.

The plaintiff in error made affidavit, that he informed the defendant in error, several days before the last *November* term, that the judgment had been reversed; and the defendant in error had notice, more than a year before, that a writ of error had been brought in the cause. That no attorney having been employed by the defendant in error in this court, the copy of the assignment of errors, and notice of rule to join in error, were served, by fixing them up, in a conspicuous place, in the office of the clerk of this court, at *Utica*. That there being no joinder in error, a default was entered, and afterwards, the rule for judgment of reversal was entered the 15th of *August*, 1810; that the writ of error was sued out in *November*, 1809, and the attorney of the defendant in error, in the court below, had notice that such writ of error was brought, and endeavored to dissuade the plaintiff in error from prosecuting it.

*Per Curiam.* As no attorney was employed on the part of the defendant, the rule to join in error ought to have been personally served on the defendant, either by delivery to him, or by leaving it at his dwelling-house, or by some other mode of service which the court might specially direct, under the circumstances of the case. This was the practice adopted in *Hardenbergh v. Thompson*, (1 *Johns. Rep.* 61.) which was on a *certiorari*, and the reason of it applies equally to this case, as the party ought not to lose a right acquired by his judgment below, until he has had a reasonable opportunity to be heard. But the principal point here is, whether the defendant is not too late in his application, and whether he \*has not waived his right by his *laches*. He says he did not hear of the reversal in time to make application before last term, and that he never received any notice of error being brought; and his attorney below says the same thing. These affidavits are rather loose and equivocal. What the defendant and his attorney mean by notice in this case, is not certain. If they mean a direct regular notice in writing, that may not have been given, and yet they may have been sufficiently apprized in season of the pendency of the writ of error to have enabled the defendant to have pleaded, and such, it is very probable,

ALBANY,  
August, 1811.  
CLEMENT  
v.  
CROSSMAN.  
[ \* 288 ]

ALBANY,  
August, 1811.

YATES  
v.  
LANSING.

was the fact ; for the plaintiff swears, that the attorney below had notice from him, as early as *November*, 1809, of the writ of error brought, and that the defendant had notice as early as *March*, 1810. The plaintiff also swears, that before the last *November* term, he gave the defendant notice of the reversal of the judgment, and had a particular conversation with him upon the subject ; and a third person also swears, that in *November* last the defendant admitted to him his knowledge of the reversal of the judgment.

There was then a *laches*, in not making application at the last *February* term, and it is one to which the defendant ought to be held.

Motion denied.

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YATES against LANSING and others.

In a joint action of *trespass* against three defendants, one of them suffered judgment to pass by default, and it was held that the other defendants could not obtain a judgment as in case of nonsuit, for not proceeding to trial ; as the plaintiff, in such case, cannot be nonsuited. (a)

[\*290] A motion was now made by *Lansing*, one of the other defendants, for judgment as in case of nonsuit, for not bringing the cause to trial.

It appeared that in *August* term last, the *venue* had been changed from *New-York* to *Albany* ; but that the declaration filed in the cause was not altered or amended accordingly, nor was any new declaration required or served.

*Per Curiam.* As this was a joint action of trespass against three defendants, and one suffered judgment by default, the other defendants cannot obtain judgment, as in cases of nonsuit, for the plaintiff cannot be nonsuited in such a case. He cannot be out of court as to the defendant who suffered judgment by default. The authorities to this point are, *Weller v. Goyton and Walker*, (1 *Burr.* 358,) and *Harris v. Butterley, &c.* (*Cowp.* 483.) It becomes, therefore, unnecessary to examine whether the defendants are prevented, by the circumstances attending the change of the *venue*, from making the motion at present.

Motion denied.

(a) One of several defendants, though they have severed in their pleas, cannot move for judgment as in case of nonsuit. *Jackson v. Wakeman*, 1 *Coven.* 177. *Bancroft v. Wilson*, 2 *Coven.* 495. And where all the defendants join in the motion, if it appear that either has no right to move, as if judgment be against him by default, the motion will be denied as to all. *Bancroft v. Wilson*, *ubi supra*.

ALBANY,  
August, 1811.  
THE PEOPLE

RUGGLES.

THE PEOPLE *against* RUGGLES.

THE defendant was indicted at the General Sessions of the Peace, held at *Kingsbury*, in the county of *Washington*, in *December*, 1810, for that he did, on the 2d \*day of *September*, 1810, at *Salem*, &c. *wickedly, maliciously, and blasphemously*, utter, and with a loud voice publish, in the presence and hearing of divers good and christian people, &c. of and concerning the christian religion, and of and concerning *Jesus Christ*, the false, scandalous, malicious, wicked and blasphemous words following, to wit, "*Jesus Christ* was a bastard, and his mother must be a whore," in contempt of the christian religion, and the laws of this state, to the evil and pernicious example of all others, &c. The indictment was removed into the Court of Oyer and Terminer and gaol delivery, held on the 11th *June*, 1811, in *Washington* county, before Mr. Justice *Spencer*, and the judges of the Common Pleas, when the defendant was tried and found guilty, and was sentenced by the court to be imprisoned for three months, and to pay a fine of 500 dollars.

The record of the proceedings and conviction, &c. having been removed to this court,

*Wendell*, for the prisoner, now contended, that the offence charged in the indictment was not punishable by the law of this state, though, he admitted, it was punishable by the common law of *England*, where *christianity* makes part of the law of the land, on account of its connection with the established church. In *England*, apostacy, heresy, reviling the ordinances of the established church, and nonconformity, are made punishable by statute. But from the preamble, and the provisions of the constitution of this state, and the silence of the legislature, it was to be inferred that *christianity* did not make a part of the common law of this state. There are no statutes concerning religion, except those relative to the Sabbath, and to suppress immorality. The constitution allows a free toleration to all religions and all kinds of worship. The exception as to *licentiousness*, refers to conduct, not opinions. *Judaism* and *Mahometanism* may be preached here, without any legal animadversion. \*For aught that appears, the prisoner may have been a *Jew*, a *Mahometan*, or a *Socinian*; and if so, he had a right, by the constitution, to declare his opinions.

The offence charged in the indictment, attacks only the

(a) *Vide Ufdegraph v. The Commonwealth*, 11 Serg. & Rawle, 394.

*Blasphemy a*  
against God,  
and contumeli:  
[ \* 291 ]  
ous rebukes,  
and profane  
ridicule of  
*CHRIST* or the  
*holy scriptures*,  
are offences  
punishable at  
the common  
law, whether ut-  
tered by words  
or writings. (a)

*Wantonly,*  
*wickedly, and*  
*maliciously ut-*  
*tering the fol-*  
*lowing words,*  
" *Jesus Christ*  
was a bastard,  
and his mother  
must be a  
whore," was  
held to be a  
public offence,  
and punishable  
by the common  
law of this  
state.

[ \* 292 ]

ALBANY,  
August, 1811.  
THE PEOPLE  
v.  
REESLES.

divinity of Christ. It is not an offence against religion in general; nor does it affect moral evidence, or destroy confidence in human testimony.

*Gold*, contra, observed, that the common law of *England*, as it stood in 1776, was adopted by the constitution, and made part of the law of the state. That *blasphemy*, or the contumelious reproaches of our Saviour, were punishable by the common law of *England*, was not on account of there being an established church, but it was a principle coeval with the *English* law, and had stood unshaken amidst all the revolutions and changes in church and state.

*Blasphemy* is defined, by *Blackstone*, (4 *Bl. Com.* 59,) to be the denying the being or providence of God; contumelious reproaches of *CHRIST*; profane scoffing at the Holy Scripture, or exposing it to contempt and ridicule. In the case of *The King v. Woolston*, (Str. 834. See *W. Black. Rep.* 398. 1 *Vent.* 293. 3 *Keb.* 607, 621,) the Court of *K. B.* declared, that they would not suffer it to be debated, whether to write against christianity in general, was not an offence punishable in the temporal courts, at common law. While the constitution of the state has saved the rights of conscience, and allowed a free and fair discussion of all points of controversy among religious sects, it has left the principle engravened on the body of our common law, that christianity is part of the laws of the state, untouched and unimpaired.

[ \* 293 ]

*KENT*, Ch. J. delivered the opinion of the Court. The offence charged is, that the defendant below did " wickedly, maliciously, and blasphemously utter, in the presence and hearing of divers good and christian people, these false, feigned, scandalous, malicious, wicked and blasphemous words, to wit, "Jesus Christ was a bastard, \*and his mother must be a whore;" and the single question is, whether this be a public offence by the law of the land. After conviction, we must intend that these words were uttered in a wanton manner, and, as they evidently import, with a wicked and malicious disposition, and not in a serious discussion upon any controverted point in religion. The language was blasphemous not only in a popular, but in a legal sense; for blasphemy, according to the most precise definitions, consists in maliciously reviling God, or religion, and this was reviling christianity through its author. (*Emlyn's Preface to the State Trials*, p. 8. See, also, *Whitlock's Speech, State Trials*, vol. 2. 273.) The jury have passed upon the intent or *quo animo*, and if those words spoken, in any case, will amount to a misdemeanor, the indictment is good.

Such words, uttered with such a disposition, were an of-  
220

fence at common law. In *Taylor's* case, (1 *Vent.* 293. 3 *Keb.* 607. *Tremaine's Pleas of the Crown*, 226. S. C.) the defendant was convicted upon information of speaking similar words, and the court of *K. B.* said, that christianity was parcel of the law, and to cast contumelious reproaches upon it, tended to weaken the foundation of moral obligation, and the efficacy of oaths. And in the case of *Rex v. Woolston*, (Str. 834. *Fitzg.* 64.) on a like conviction, the court said they would not suffer it to be debated whether defaming christianity in general was not an offence at common law, for that whatever strikes at the root of christianity, tends manifestly to the dissolution of civil government. But the court were careful to say, that they did not intend to include disputes between learned men upon particular controverted points. The same doctrine was laid down in the late case of *The King v. Williams*, for the publication of *Paine's "Age of Reason,"* which was tried before Lord *Kenyon*, in *July*, 1797. The authorities show that blasphemy against God, and contumelious reproaches and profane ridicule of Christ or the Holy Scriptures, (which are equally treated \*as blasphemy,) are offences punishable at common law, whether uttered by words or writings. (*Taylor's* case, 1 *Vent.* 293. 4 *Blacks. Com.* 59. 1 *Hawk.* b. 1. c. 5. 1 *East's P. C.* 3. *Tremaine's Entries*, 225. *Rex v. Doyley.*) The consequences may be less extensively pernicious in the one case than in the other, but in both instances, the reviling is still an offence, because it tends to corrupt the morals of the people, and to destroy good order. Such offences have always been considered independent of any religious establishment or the rights of the church. They are treated as affecting the essential interests of civil society.

And why should not the language contained in the indictment be still an offence with us? There is nothing in our manners or institutions which has prevented the application or the necessity of this part of the common law. We stand equally in need, now as formerly, of all that moral discipline, and of those principles of virtue, which help to bind society together. The people of this state, in common with the people of this country, profess the general doctrines of christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order. Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful. It would go to confound all distinction between things sacred and profane; for, to use the words of one of the greatest oracles of

ALBANY,  
August, 1811.  
THE PEOPLE  
v.  
RUGGLES.

[ \* 294 ]

ALBANY.  
August, 1811  
THE PEOPLE  
v.  
RUGGLES.

[\* 295]

human wisdom, "profane scoffing doth by little and little deface the reverence for religion;" and who adds, in another place, "two principal causes have I ever known of atheism—curious controversies and profane scoffing." (*Lord Bacon's Works*, vol. 2, 291. 503.) Things which corrupt moral sentiment, as obscene actions, prints and writings, and even gross instances \*of seduction, have, upon the same principle, been held indictable ; and shall we form an exception in these particulars to the rest of the civilized world ? No government among any of the polished nations of antiquity, and none of the institutions of modern *Europe*, (a single and monitory case excepted,) ever hazarded such a bold experiment upon the solidity of the public morals, as to permit with impunity, and under the sanction of their tribunals, the general religion of the community to be openly insulted and defamed. The very idea of jurisprudence with the ancient lawgivers and philosophers, embraced the religion of the country. *Jurisprudentia est divinarum atque humanarum rerum notitia.* (*Dig. b. 1. 10. 2. Cic. De Legibus*, b. 2. *passim.*)

The free, equal, and undisturbed, enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and secured ; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right. Nor are we bound, by any expressions in the constitution, as some have strangely supposed, either not to punish at all, or to punish indiscriminately the like attacks upon the religion of *Mahomet* or of the grand *Lama* ; and for this plain reason, that the case assumes that we are a christian people, and the morality of the country is deeply ingrafted upon christianity, and not upon the doctrines or worship of those impostors. Besides, the offence is *crimen malitiae*, and the imputation of malice could not be inferred from any invectives upon superstitions equally false and unknown. We are not to be restrained from animadversion upon offences against public decency, like those committed by Sir *Charles Sedley*, (1 *Sid. 168.1*) or by one *Rollo*, (*Sayer, 158.*) merely because there may be savage tribes, and perhaps semi-barbarous nations, whose sense of shame would not be affected by what we should consider \*the most audacious outrages upon decorum. It is sufficient that the common law checks upon words and actions, dangerous to the public welfare, apply to our case, and are suited to the condition of this and every other people whose manners are refined, and whose morals have been elevated and inspired with a more enlarged benevolence, by means of the christian religion.

Though the constitution has discarded religious establishments, it does not forbid judicial cognisance of those offences

against religion and morality which have no reference to any such establishment, or to any particular form of government, but are punishable because they strike at the root of moral obligation, and weaken the security of the social ties. The object of the 38th article of the constitution, was, to "guard against spiritual oppression and intolerance," by declaring that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, should for ever thereafter be allowed within this state, to all mankind." This declaration, (noble and magnanimous as it is, when duly understood,) never meant to withdraw religion in general, and with it the best sanctions of moral and social obligation from all consideration and notice of the law. It will be fully satisfied by a free and universal toleration, without any of the tests, disabilities, or discriminations, incident to a religious establishment. To construe it as breaking down the common law barriers against licentious, wanton, and impious attacks upon christianity itself, would be an enormous perversion of its meaning. The *proviso* guards the article from such dangerous latitude of construction, when it declares, that "*the liberty of conscience hereby granted*, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of this state." The preamble and this *proviso* are a species of commentary upon the meaning of the article, and they sufficiently show that the framers of the constitution intended only \*to banish test oaths, disabilities and the burdens, and sometimes the oppressions, of church establishments; and to secure to the people of this state, freedom from coercion, and an equality of right, on the subject of religion. This was no doubt the consummation of their wishes. It was all that reasonable minds could require, and it had long been a favorite object, on both sides of the *Atlantic*, with some of the most enlightened friends to the rights of mankind, whose indignation had been roused by infringements of the liberty of conscience, and whose zeal was inflamed in the pursuit of its enjoyment. That this was the meaning of the constitution is further confirmed by a paragraph in a preceding article, which specially provides that "such parts of the common law as might be construed to establish or maintain any particular denomination of christians, or their ministers," were thereby abrogated.

The legislative exposition of the constitution is conformable to this view of it. Christianity, in its enlarged sense, as a religion revealed and taught in the Bible, is not unknown to our law. The *statute for preventing immorality* (*Laws*, vol. 1. 224. *R. S.* 675, s. 69, *et seq.*) consecrates the first day of the week, as holy time, and considers the violation of it as immoral. This was only the continuation, in substance,

ALBANY.  
August, 1811.  
THE PEOPLE  
v.  
RUGGLES

[ \* 297 ]

ALBANY,  
August, 1811.

BRADT  
v.  
WALTON.

[ \* 298 ]

of a law of the colony which declared, that the profanation of the Lord's day was "the great scandal of the christian faith." The act *concerning oaths*, (*Laws*, vol. 1. p. 405. [2 R. S. 407, s. 82,]) recognises the common law mode of administering an oath, "by laying the hand on and kissing the gospels." Surely, then, we are bound to conclude, that wicked and malicious words, writings and actions which go to vilify those gospels, continue, as at common law, to be an offence against the public peace and safety. They are inconsistent with the reverences due to the administration of an oath, and among their other evil consequences, \*they tend to lessen, in the public mind, its religious sanction.

The court are accordingly of opinion that the judgment below must be affirmed.

Judgment affirmed.

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BRADT against WALTON and VANHORNE.

*A.* having purchased a lot of land of *B.* the title to which was doubtful, released and re-conveyed to *B.* all his right and title to the lot; and at the request of *B.* consented that *B.* might use the name of *A.* in an action of ejectment to recover the land, but *A.* was not to be at any further expense, or have any thing to do with the suits or lots in question, except as to the using his name, if necessary.

*B.* employed *C.*, an attorney, to bring actions

of ejectment, and told *C.* that *A.* had consented to let his name be used, and *C.* accordingly used the name of *A.* as one of the lessors. The plaintiff in the suits was nonsuited, in consequence of which *A.*, as one of the lessors, was obliged to pay the costs. *A.* brought an action on the case against *C.*, the attorney, for using his name without his consent, so as to subject him to the payment of costs, &c.; it was held that the authority given by *A.* to *B.* being conditional and limited, *C.* followed the directions of *B.* at his peril, and had no right to use the name of *A.* so as to subject him to any costs or expenses; and that *A.* was entitled to recover of *C.* the amount of the costs which he had been compelled to pay. (a)

(a) See the cases relating to the powers and liabilities of general and special agents in *Gibson v. Cole*, 7 Johns. Rep. 390, note (a).

The plaintiff proved, that he and *Eli Parsons*, another of the lessors, had, before the commencement of the suits in ejectment, to wit, on the 5th *February*, 1807, quit-claimed and conveyed to *John Lepper*, the other lessor, all their interest in the land in question; and *J. Williams*, \*a witness, testified that in a conversation between *Bradt*, *Lepper* and *Parsons*, relative to the lot, *Bradt* said that he would not be at any further cost or expense about the lot; and they finally agreed that *Bradt* and *Parsons* should release all their right to *Lepper*, so that he might take what steps he pleased to recover the land, and the conveyances were afterwards executed to *Lepper*.

ALBANY.  
August, 1811.

BRADT  
v.  
WALTON.

[ \* 299 ]

*Lepper* and *Parsons*, being previously released by the plaintiff, were admitted as witnesses and testified, that *Bradt* and *Parsons* purchased the lot in question of *Lepper*, but it was agreed, that they were not to pay for it, unless they were successful in recovering it. After much trouble and expense in endeavoring to obtain the lot, before the *Onondaga* commissioners, *Lepper* requested *Parsons* to prosecute a suit at law for the lot, and they called on *Bradt* the 5th *February*, 1807, when *Williams*, the other witness, was present. *Bradt* refused to furnish any more money, or to be at any further trouble or expense about the land; and it was agreed, that *Parsons* and *Bradt* should release to *Lepper*, who might proceed to recover the land, in such manner as he chose; and the deed of release was accordingly executed. *Parsons* afterwards suggested, that in prosecuting a suit for the recovery of the land, it might be necessary to use the names of *Parsons* and *Bradt* as lessors, and they consented that *Lepper* might use their names, if his counsel should think it necessary; but *Bradt*, at the same time, refused to be at any further expense, or to have any concern with the suits, further than the use of his name. A few days afterwards, *Lepper* and *Parsons* went to the defendants, and requested them to bring suits to recover the lot in question; and after being informed by *Parsons*, that *Bradt* had consented that his name might be used, the defendants commenced the actions of ejectment, and made use of the name of *Bradt*, as one of the lessors. It appeared that *Parsons* agreed \*with *Lepper* to carry on the suits, at his own expense, in consideration, that in case of a recovery, he should have half of the lot.

[ \* 300 ]

It appeared also, that when *Parsons* and *Bradt* executed the release to *Lepper*, he gave them a writing, engaging to pay them 50 dollars, in case he recovered the land; and which was intended to recompense them, in part, for the expenses they had incurred in attempting to obtain the lot before the commissioners. This agreement which was held by *Parsons*, was given up to *Lepper*, at the time of the agreement

ALBANY,  
August, 1811.

BRADT  
v.  
WALTON.

between them as to the suits and the division of the lot, in case it was recovered.

The judge charged the jury, that if they believed the plaintiff had authorised the defendants to make use of his name in the suits of ejectment, they ought to find a verdict for the defendants, and he expressed his opinion that the plaintiff had given such authority; but if they believed that the defendants were not authorised by the plaintiff to use his name, then the jury ought to find for the plaintiff, for the amount of the costs he had been obliged to pay. The jury found a verdict for the defendants.

A motion was now made to set aside the verdict and for a new trial.

*N. Williams*, for the plaintiff. The consent or authority given by the plaintiff to *Lepper* and *Parsons*, to use his name, was *special* and *limited*, that is, to use his name in such manner as not to subject him to the payment of any costs. A special agent, acting under a written or verbal authority, must act within the scope of his authority; and if he exceeds it, his acts are void. (*Co. Litt.* 258. a. note 1. *Perk.* 189. 5 *Johns. Rep.* 58. 3 *Term Rep.* 760. 1 *Esp. Rep.* 111. 2 *Johns. Rep.* 48. 6 *Johns. Rep.* 52. 7 *Johns. Rep.* 390.)

[*KENT*, Ch. J. The principles as to agents are too well settled to be disputed.]

[\* 301] If, then, the defendants have acted from the authorization \*of an agent, who has exceeded his powers, they must be liable. The defendants might use the name of the plaintiff; but if they did so, they were bound to protect him against the payment of costs. If made liable to refund to the plaintiff for the costs he has been obliged to pay, they cannot complain. It was their duty to have looked to the authority of the agents, and if they have been guilty of fraud or deception, the defendants ought to suffer, rather than the plaintiff, who is innocent. It never was the intention of the parties, that the plaintiff should be liable for any further costs. The plaintiff never gave the defendants any authority whatever. The relation of client and attorney did not exist between them. The defendants had the deed of release before them, and must have known that the plaintiff had no interest in the suits.

*Gold*, contra. This is an action against the defendants, for using the name of the plaintiff without his consent; but it is proved, that he did consent that his name might be used, and that is sufficient to defeat the action.

There was, in fact, a power from the plaintiff to *Lepper* and *Parsons* to use his name; and a contract on their part to indemnify him against any cost or expense. If the plaintiff has been damned, he must resort to the contract of indemnity. It does not appear but that *Lepper* and *Parsons* are competent to indemnify him; and if they are not, he should have taken security. It is enough for the defendants, that the plaintiff consented that his name might be used as lessor. The question of damages or costs, lies altogether between the plaintiff and his agents.

Suppose *Lepper* and *Parsons* had been the attorneys, could they have been made liable in this action? Must not the plaintiff have resorted to the contract of indemnity?

The defendants stand in the place of *Lepper* and *Parsons*, and cannot be made liable in this suit, if they are not responsible.

ALBANY,  
August, 1811.

BRADY  
v.  
WALTON.

[ \* 302 ]

Again, the costs contemplated by the parties were the usual costs of prosecuting the suits in ejectment; not the unforeseen costs of a nonsuit, or a verdict for the defendant.

*Cady*, in reply, was stopped by the court.

VAN NESS, J. I am satisfied that I was wrong in the opinion which I gave to the jury. It was a voluntary and gratuitous license on the part of the plaintiff, who might annex to it what condition he thought proper. It is admitted, that the defendants stand in the place of *Lepper* and *Parsons*, and could have no other or greater power than they possessed. If so, then they could not use the name of the plaintiff, but on the condition annexed to the consent given by him to *Lepper* and *Parsons*.

*Per Curiam.* The leave given by the plaintiff to use his name, as one of the lessors, was not only gratuitous, for he had no interest in the suit, but it was specific. It was granted upon the condition that he should not be "at any further expense, or have any thing to do with the suits or lots." This was evidently the understanding of the parties, at the time that the plaintiff consented that *Lepper* might use his name. The plaintiff never meant to be liable, in any event, to any costs or expense that might thereafter be created, in relation to the lot, or to any suit concerning it, and so *Lepper* and *Parsons* must have understood him. They were bound, in good faith, and under their circumscribed authority, to have disclosed to the defendants, when they employed them, the special terms upon which they were permitted to use the name of the plaintiff. They did not do it, and the plaintiff has been eventually subjected to great loss and \*damage.

[ \* 303 ]

ALBANY,  
August, 1811.

BRADT

v.  
WALTON.

The single question is, whether he has his remedy, not only against *Lepper* and *Parsons*, who abused, by exceeding their power, but also against the defendants, who so used his name, under the directions of *Lepper* and *Parsons*. The defendants took the directions of their employers, at their peril. They used the name of the plaintiff, at the peril of being responsible to him, if they, by that means, subjected him to cost and expense. If *Lepper* and *Parsons* could not use his name, but under the condition annexed, no person employed by them could do it. The parties to this suit may be considered as equally innocent of any intentional injury, but the plaintiff has the legal right of action, as the defendants have used his name contrary to his instructions, so as to produce cost and expense to him. If his name could not be used, without putting him to cost and trouble, he meant that it should not be used at all, and so he told the persons who employed the defendants. He had a right to annex that condition to the license, even if it went to defeat it altogether. If *Parsons* and *Lepper* are insolvent and unable to satisfy these costs, the defendants ought rather to pay them than the plaintiff, for the defendants have trusted to the naked declarations of their clients, but the plaintiff bound them by a special authority.

The verdict ought, therefore, to be set aside, and a new trial awarded with costs, to abide the event of the suit.

New trial granted.

ALBANY,  
August, 1811.BRIGGS  
v.  
TILLOTSON.

## \*BRIGGS against TILLOTSON.

IN error, on *certiorari*, from a justice's court. The parties in *January*, 1809, submitted to the judges of the Court of Common Pleas of *Schoharie*, a piece of cloth, for the bounty of eighty dollars, given by the legislature, and, at the time of the submission, made to each other mutual promises, to wit: *Briggs* promised, that if the cloth presented by him obtained the bounty, that then he would pay *Tillotson* the one half thereof, deducting the charges for procuring the bounty, on the condition that *Tillotson* was entitled to present his cloth, it being fulled and dressed out of the county, but in all other respects manufactured within it; and *Tillotson* made the same promise to *Briggs*, without any condition. The premium was adjudged to *Briggs*, and on his refusing to pay the moiety, this action was brought.

The promise was fully proved. On the trial, *Briggs* relied on another condition, that *Tillotson* was bound by the contract to procure the decision of the society of arts, and of Mr. *Metcalf*, on the point, whether the fulling and dressing his cloth out of the county entitled him to present it. The evidence, however, did not support the fact, that such promise was made, or that the bargain \*depended on it. *Tillotson* recovered twenty-five dollars, the expense of fifteen dollars being deducted.

The points raised for the consideration of the court were; 1. That the contract was against sound policy, by defeating the object of the act, by preventing competition; 2. That *Tillotson* had no claim to the premium, his cloth having been fulled and dressed out of the county.

*Sedgwick*, for the plaintiff in error.

*Hamilton*, contra.

*Per Curiam*. Had the contract been made prior to the complete manufacture of the cloth, it would have been against

an action of *assumpit* against him, to recover the half.

It was held that the contract being made after the manufacture was complete, it was not against the policy of the act, as it could then have no influence on the competition between the parties. (a)

To entitle a party to present cloth, in order to obtain the bounty given by the 2d section of the act, it is not requisite that it should be *fullled and dressed* in the same county in which it was manufactured, but it is sufficient, if it was *manufactured* in the *family* of the party within the county.

The promise of *B.* to *A.* was a sufficient consideration for the promise of *A.* to *B.*

(a) *Vide Wilbur v. How*, *infra* 444. *Thompson v. Davies*, 13 Johns. *Rep.* 112, as to contracts against public policy and the policy of the law.

*A.* and *B.* submitted pieces of cloth, of their own manufacture, respectively, to the judges of the county, in order to obtain the bounty given by the act of the legislature; (sess. 31. c. 186. s. 2.) and, at the time of the submission, *A.* promised, that if the cloth, presented by him, obtained the bounty, he would pay the one half of the bounty to *B.* deducting the expense of procuring it, on condition that *B.* was entitled

[\* 305]

to present his cloth, it having been fulled and dressed out of the county, but in all other respects manufactured within it, in the family of *B.*, and *B.* made a similar promise, to *A.* to pay him one half of the bounty in case *A.* should obtain it, but without any condition. The bounty was adjudged to *A.*, and *B.* brought

ALBANY,  
August, 1811.

Briggs  
v.  
Tillotson.

the policy of the act to tolerate agreements like the present, but the contract being after the completion of the cloth, could have no influence on the competition of the parties, and could not, therefore, be in fraud of the act. It is idle to suppose that, but for the agreement, which was known to the judges, the premium would not have been awarded. They adjudged *Briggs's* cloth to be the best, and the idea cannot be admitted that they were influenced in their decision by any improper or extraneous circumstances. The case, therefore, of *Dolin v. Ward*, (6 *Johns. Rep.* 194,) does not apply.

Had *Tillotson* a right to present his cloth for the bounty? The premium is to be awarded to the person who *shall, in his family, manufacture* within any of the counties of this state, the best specimen of woollen cloth, of uniform texture and quality, not less than 30 yards," &c. (Sess. 31, c. 186, s. 2.)

Now it never could have been the object of the legislature to confine the premium to those only who possessed fulling mills; and the terms *manufacture in his family*, exclude the idea that the cloth was to be fulled and dressed in the family.

[\* 306]

If it was spun and wove in the family, \*that was all that was intended or required. Whether the judges would not have required that the specimens presented should have been fulled and dressed, is a distinct consideration. The legislature meant to encourage domestic manufactures, and they did not intend to require that each domestic manufacturer should have in his family a fulling mill.

To render the bounty equal, it was extended to all the counties, and it cannot be contended that the legislature meant to confine the fulling and dressing the cloth to the county in which it was manufactured. It does not extend the premium to fulling and dressing, but to family manufactures; and when the fabric of the cloth is so far completed as to be spun and wove in a family, that is all that can be inquired into.

It was suggested that there was no consideration for *Briggs's* promise to pay half the premium. *Tillotson's* promise to pay *Briggs* half, if it was adjudged to him, was the consideration of *Briggs's* promise; and that one promise may be the consideration of another, is well settled; all stock contracts have the same basis, and they have been repeatedly held to be valid.

The judgment must be affirmed.

OF THE STATE OF NEW-YORK.

\*307

ALBANY,  
August, 1811.

BARKER

v.  
PHOENIX INS  
CO.

\*BARKER against THE PHÆNIX INSURANCE COMPANY.

THIS was an action on a policy of insurance on goods, laden on board "the *American* ship called the *Rodman*, at and from *St. Petersburg* to *New-York*." The policy was dated the thirty-first *October*, 1807, and twenty thousand dollars subscribed, at a premium of three *per cent.*

The cause was tried at the last *June* sittings, in *New-York*, before Mr. Justice *Thompson*.

The ship sailed from *St. Petersburg*, on the sixth *October*, 1807, with a full cargo of iron and hemp; and in the night of the same day, struck on a rock at the north end of *Hochland*. After considerable exertions, with assistance from shore, the ship was got off the next day, and came to anchor, but made a great deal of water; and the wind continuing to blow hard, she dragged her anchors, and, to get clear of the island of *Hochland*, the master was obliged to set sail and cut the cables. On the tenth *October*, the ship again struck on *Cable Ground*, but beat over and continued sail, the wind blowing hard and the vessel laboring much. The weather being very tempestuous, and the ship continuing leaky, the master was compelled to go into the roads of *Copenhagen*; as the crew refused to proceed with the ship, unless she was repaired.

The ship was regularly surveyed at *Copenhagen*, and it became necessary to land the cargo, which was also surveyed. After the necessary repairs were completed, the cargo reloaded, (except three bundles of hemp, which were damaged,) and the ship ready for sea, the master, on the twenty-fifth *March*, 1808, applied to the *American* consul, to obtain a clearance, and permission to proceed to *New-York*, and the consul

of interest and loss, and renewed his claim for a total loss; and at the expiration of thirty days thereafter brought his action. It was held, that the act of abandonment on the 5th *October* was valid, and sufficient to fix the technical total loss, and that the preliminary proofs were sufficient to entitle the insured to bring his action, admitting that they were not sufficient on the 5th *October*, for the whole might be considered as one entire transaction. (a)

Where a ship on voyage from *St. Petersburg* to *New-York*, met with an accident, by the peril of the sea, in consequence of which she put into *Copenhagen*, from necessity, in order to refit, it was held that the wages and provisions of the crew, the expenses of unloading, repairing, reloading, storage, &c. from the time of the accident, until the ship was again ready to sail, were general average; a proportion of which was to be paid by the insurer on the cargo, in addition to a total loss, the cargo having been forcibly detained by order of the *Danish* government. (b)

Where the insurance was expressed to be on the "good *American* ship called the *Rodman*," it was held to be a warranty that the ship was *American*; and proof that she was owned by an *American* citizen, and had all the papers for an *American* vessel, except a *register*, having sailed with a *sea-letter* only, was held to be sufficient evidence of a compliance with a warranty. (c)

(a) See, as to preliminary proofs, the cases in note (a) to *Johnston v. Columbian Ins. Co.* 7 *Johns. Rep.* 315. See, also, *Catlett v. Pacific Ins. Co.* 1 *Wendell*, 561.

(b) *Vide Heyliger v. New-York Firemen Ins. Co.* 11 *Johns. Rep.* 85. *Dunham v. Commercial Ins. Co.* *Id.* 315.

(c) *Vide Coolidge v. N. Y. Firemen Ins. Co.* 14 *Johns. Rep.* 308. *Catlett v. Pacific Ins. Co.* 1 *Wendell*, 561.

The clause in the *New-York* policies of insurance, that the loss is to be paid in 30 days after proof of interest and loss, is merely to furnish reasonable information to the insurer, and is liberally construed, to require only the best evidence of the fact in the possession of the party at the time. On the 5th *October*, the insured made an abandonment in writing.

[ \* 308 ]

accompanied with a copy of a letter from the master of the ship to the correspondents of the insured, stating the fact and causes of loss, and on the 21st of *October*, the insured delivered to the insurers all the requisite documents containing full proof

ALBANY,  
August, 1811.

BARKER  
v.  
PHOENIX INS.  
CO.

[\*309]

informed the master, that there was an embargo at *Copenhagen* on all merchant vessels, so that it was impossible to obtain a clearance. When the ship first arrived at *Copenhagen*, there was no embargo, nor did the master know of it, until after she was reladen, and the information given by the *American* consul. The master had an interview with the King of *Denmark*, in order to obtain a clearance, which was granted, and His Majesty, in consideration that the ship was forced into *Copenhagen* in distress, granted permission that she might sail, in ballast, with a sufficient store of provisions for the voyage; but refused to permit her to sail with her cargo, which he said must be unladen, and observed that the embargo must be continued during the war with *England*. Under these circumstances, to save the expenses of the vessel and cargo, during the uncertain continuance of the embargo, the master, with the advice of the *American* consul, relanded the cargo, and sailed from *Copenhagen*, in ballast, on the twenty-ninth *May*, 1808, bound for *New-York*. By reason of unfavorable winds and contrary currents, she was forced to anchor in the sound, at *Elseenburgh*, where she remained six days. The mate and three of the crew becoming sick and unable to do duty, the master deemed it prudent to put into *Gottenburgh*, on the sixth *June*, where the mate died, and three of the crew were left in the hospital. Having obtained another mate, the master took a freight from *Gottenburgh* for *St. Petersburgh*, where he arrived the twenty-fourth *July*, 1808.

The plaintiff proved that on the fifth *October*, 1808, he addressed the following letter of abandonment to the defendants, which was delivered to them. "Gentlemen, having received information of the detention of the *Rodman's* cargo at *Copenhagen*, I hereby abandon to you such proportion of it as is insured at your office, by a policy dated thirty-first *October*, 1807, and shall expect payment for a total loss, in thirty days from the date hereof." "N. B. You have, herewith, a copy of a letter from Captain *Corliss* to *Thomas Mullett & Co.* containing all the information I have received on the subject of the *Rodman's* cargo." The letter of the captain was dated at *Gottenburgh*, the eleventh *July*, 1808, and referred to a former letter to *T. Mullett & Co. of London*, informing them that the cargo of the *Rodman* had been detained at *Copenhagen*, by order of the *Danish* government, and was left in the hands of Messrs. *Ryburg & Co.* for the account of the plaintiff. This letter also detailed the facts above stated, relative to what took place at *Copenhagen*, and specified the articles and amount left at *Copenhagen*.

On the twenty-first *October*, 1808, the plaintiff sent to the defendants a bundle of papers, as proof of interest and loss.

when he again claimed payment for a total loss; and this suit was not commenced until thirty days after. Among the papers delivered to the defendants, were a survey on the vessel at *Copenhagen*, a survey of the cargo, a *protest* of the captain and crew, made at *Copenhagen*, dated the twenty-third *October*, 1808, and a certificate of the *American* consul, dated the twenty-seventh *May*, 1808, an account of *Smith & Co.* the shippers of the cargo at *St. Petersburg*, by which it appeared that it cost twenty-nine thousand dollars; and an invoice and bill of lading, showing that the property belonged to the plaintiff.

\*The counsel for the defendants objected to the preliminary proof as insufficient, but the objection was overruled.

The plaintiff's counsel then read in evidence the deposition of the master, which detailed the facts relative to the ship and cargo above stated, and the accounts referred to by him, in which were the expenses of the vessel, including repairs, captain's and seamen's wages, provisions, and all other expenses in relation to vessel and cargo, from the time she met with the accident which obliged her to go into *Copenhagen*, until she sailed from thence, and claimed an average contribution from the defendants for all those charges, except such as were properly chargeable as a particular average on the vessel. The counsel for the defendants objected to their being charged with any of those expenses, on the ground that the vessel never pursued her voyage to *New-York*; and they particularly objected to the liability of the defendants for any of the expenses incurred at *Copenhagen*, after the twenty-fifth *March*, 1808, when the cargo was reladen, and the vessel ready to sail on her voyage, and would have sailed, had it not been for the embargo. And the judge ruled that the defendants were liable to contribute for the expenses incurred previous to the twenty-fifth *March*, 1808, but not for those subsequent to that date.

A witness for the plaintiff testified, that the ship was the property of the plaintiff, who was a native *American* citizen, and that she was worth sixteen thousand dollars, but being only a *sea-letter* vessel, she would be worth one thousand dollars less. That she sailed from *New-York* for *St. Petersburg* properly documented, as a *sea-letter* vessel. The counsel for the defendants objected to any parol proof of the documents, and the objection was sustained by the judge. Another witness testified that the ship was *English built*, and not worth more than twelve thousand dollars.

The counsel for the defendants moved for a nonsuit, on the ground that the vessel was warranted by the policy, \*to be an *American* vessel, and the plaintiff had produced no proof of her being such; but on the contrary, it appeared

ALBANY,  
August, 1811.  
BARKER  
V.  
PHENIX INS.  
CO.

[ \*310 ]

[ \*311 ]

ALBANY  
August, 1814.

BARKER  
v.  
PHOENIX INS.  
CO.

from the testimony in the cause, that she was only a *sea-letter* vessel, without an *American* register.

The judge overruled the motion, and directed the jury to find for a total loss; and for a portion of the average expenses, which had accrued previous to the twenty-fifth *March*, 1808; and the jury found a verdict accordingly, for twenty-six thousand three hundred eighty-two dollars and ninety-seven cents.

A motion was made to set aside the verdict, and for a new trial.

*Harris* and *Van Vechten*, for the defendants. 1. The preliminary proofs were not sufficient to entitle the plaintiff to recover.

The doctrine of abandonment does not necessarily arise out of the contract of insurance. It has been introduced for the convenience of the insured. It is an indulgence which, the courts in *England* say, has been carried far enough, and ought not to be extended.

When an abandonment is made, the insured is bound to exhibit to the insurers satisfactory evidence of a total loss. The bare allegation of the insured is not sufficient. Though *technical* proof may not be necessary, yet there must be *proof* of interest and loss, and this under oath. The *protest* of the captain is always mentioned among the requisite proofs. (1 *Johns. Rep.* 181. *Condyl's Marsh.* 601. a. note. 716. note. 2 *Johns. Rep.* 136. 1 *Caines*, 49. 1 *Johns. Cas.* 313. 4 *Johns. Rep.* 132.) Here, the only evidence of loss was the *copy* of a letter from the captain to *T. Mullett & Co.*

[*KENT, Ch. J. In Craig v. The United Insurance Company*, the preliminary proof consisted only of three letters.]

[\*312]

The letters in that case were originals; but here is a *\*copy* only of a letter, which refers to a former letter of the master, which is not produced.

It may be said, on the other side, that the documents delivered to the defendants, on the twenty-first of *October*, supplied all deficiency of the proofs on the fifth of *October*, when the abandonment was made. But the abandonment is definitive at the time it is made. (1 *Johns. Rep.* 281. 1 *Johns. Cas.* 311.) If not good then, it is void. Subsequent proofs cannot revive and make effectual a former void abandonment.

2. The wages and provisions, and expenses of unloading and storage of the cargo, during the detention at *Copenhagen*, ought not to have been brought into general average.

To support a claim of contribution for general average, the loss or damage must have been voluntarily incurred, for the general safety of the ship and cargo; and it must appear that the ship and residue of the cargo have been, in fact, saved. (*Marshall on Ins.* b. 1. c. 12, s. 7. *Ef. lib. 14. Lex Rhod. de jactu.*

ALBANY,  
August, 1811  
BARKER  
v.  
PHOENIX INS  
CO

These expenses fall exclusively on the freight; and are not to be brought into general average. *Abbott* (*Abbott on Ship.* part III. c. 8. s. 8, 9) seems to consider the question as unsettled in *England*, but in *M'Bride v. The Marine Insurance Company*, (7 *Johns. Rep.* 431. *Beawes' Lex Merc.* 148. *Park.* 172. *Magens.* 56. 64. 98. 240. *Ord. Louis.* XIV. tit. *Contrib.* art. 15, 16,) a case analogous to the present, this court decided that the wages of the crew, during the detention of a ship by an embargo, are not general average, but fall exclusively on the ship.

The principle of the decision in *Penny & Scribner v. The New-York Insurance Company*, (3 *Caines*, 155,) overrules the cases of *Walden v. Le Roy*, (2 *Caines*, 263.) and *Henshaw v. The Marine Insurance Company*, (2 *Caines*, 274.)

[*KENT, Ch. J.* The case of *Sharp v. Gladstone*, (7 *East*, 24,) confirms the decision in the case of *Walden v. Le Roy*, that *wages* and *provisions* to the crew, during a forcible detention in a foreign port, are general average.]

\*Though the owner of the cargo may be liable to contribute to these expenses, as general average, does it follow that the insurer is obliged to contribute? No *freight* has been earned in this case. The goods have never arrived at the port of destination. The insurers on the cargo can derive no possible benefit from these expenses. Putting the embargo out of the case, suppose it had been necessary to hire another ship, to bring on the cargo to *New-York*, would the cargo or the defendants have been liable for the hire of the new ship? If not, neither can they be liable for the expenses of the old ship.

[\*313]

Again, the plaintiff under the declaration in this action, cannot recover for a general average. The liability of an insurer for general average, does not arise out of the contract of insurance. The defendants are not liable, if at all, *qua* insurers, but as *owners*, in consequence of the abandonment. The plaintiff must, therefore, sue on the implied contract to contribute, as owners.

3. The ship was warranted *American*, and the plaintiff did not prove a compliance with the *warranty*. The words "good *American* ship," amount to a warranty that she is *American*. (1 *Johns. Case.* 341. 2 *Johns. Case.* 168. 3

ALBANY,  
August. 1811.

BARKER  
v.  
PHOENIX INS.  
CO.

*Bos. & Pull. 201. 499.*) The plaintiff was bound to prove the fact, by documentary evidence.

All the evidence produced was, that she was a *sea-letter* vessel, owned by the plaintiff. The *warranty* implies, that she is a registered vessel of the *United States*; and to be registered, she must be *American* built. In *Baring v. Claggett*, (3 *Bos. & Pull.* 201.) Lord *Alvanley* says, to entitle a ship to become an *American* ship, within the meaning of the treaty between *France* and the *United States*, or to the privilege of carrying the *American* flag, as a safe conduct among belligerents, she must have a register.

Sea-letters were first issued in 1793, by the custom-houses, pursuant to an order of the President of the *United States*. In 1796, by an act of congress, (4th *cong. sess.* 1. c. 45.) it was made the duty of the secretary of state to prepare a form of a *passport* for ships and vessels of the *United States*; and every ship and vessel going to any foreign country were required to take these *passports*. In 1803, an act was passed, (7th *cong. sess.* 1. c. 69.) directing these *passports* to be granted to unregistered ships, owned by citizens of the *United States*, or ships sailing with a *sea-letter*. According to this act, a *sea-letter* and a *passport* are distinct papers. It appears that though a *sea-letter* formerly meant a *passport*, it now means only a *certificate of ownership*, (*Sleight v. Rhinelander*, 2 *Johns. Rep.* 531. 547.) a document that has no relation to the national character of the vessel.

This ship, then, being a mere *sea-letter* vessel, was not documented according to the treaties between the *United States* and foreign powers; and did not, therefore, possess the national character required by those treaties to entitle her to protection under them. (Treaty with *Holland*, 1782, art. 10. 25. Treaty with *Spain*, 1795, art. 17. Treaty with *Tripoli*, 1796, art. 4. with *Tunis*, 1799, art. 4. with *France*, 1800, art. 4.) The want of the *passport*, or any of the documents required by those treaties, would expose the vessel to be captured and condemned.

To comply with the warranty of neutrality, the insured must show not only that the vessel is owned by a neutral, but that she was furnished with all the documents required by the law of nations or public treaties, to establish her neutral character. (*Park*, 469. 7 *Term. Rep.* 631. 705. 1 *Caines*, 549 2 *Johns. Rep.* 157. 2 *Esp. Cas.* 615.) Mere *ownership* may be proved by parol; but the national character of a vessel can only be shown by written documents.

*Henry, contra.* 1. The reason of the clause, inserted in our policies, requiring proof of loss and interest before commencing an action, was to enable the insurers to decide as to 236

accepting the abandonment, or not. Technical proof, it is conceded, is not requisite. Reasonable and satisfactory evidence must, then, be sufficient; and the letters exhibited contained that evidence. Again, the formal abandonment was made on the 5th of *October*, \*but on the 21st of *October*, all the documents and papers were exhibited, accompanied with a renewal of the claim for a total loss; and the suit was not commenced until 30 days after. A *protest* by a *sailor*, a *gazette* account, a *notice* at *Lloyd's* coffee-house, have been deemed sufficient evidence of loss, on which to ground an abandonment.

2. None of the wages or expenses subsequent to the 25th of *March*, 1808, were allowed by the jury.

The principle on which average contributions are allowed in such cases is, that the expenses have been incurred for the general benefit; it being just and reasonable, that where it is for the benefit of all, the expense should be divided among all. The subsequent loss by the embargo, which prevented the arrival of the goods, does not vary the case. For suppose the agent of the insurers had been on the spot, and had paid his proportion of the general average, could the defendants have, afterwards, recovered back the money paid, on the ground of the subsequent event?

The objection that the insurers are not liable, *qua* insurers, is, at best, technical, and deserving of no weight, when the merits are with the plaintiff.

3. It was impossible for the plaintiff to produce the *sea-letter*, in this case, as the vessel has never returned to the *United States*. The case admits the fact that she had a *sea-letter*, and that she was properly documented as a *sea-letter* vessel; and the defendants must be bound by this admission.

The objection, then, is this, that she was not an *American* vessel, within the meaning of the warranty, because she was not *registered*.

The words "good *American* vessel," do not necessarily imply that she has a *register*, but only that she is *American* property. An *American built* ship, owned by native citizens, may lose her register, or the privilege of \*a registered vessel, if she does not comply with the requisites of the register act; yet she does not cease to be an *American* vessel. If she is not an *American* vessel, what is she? Is she *French*, *English*, or *Spanish*?

By the act of congress, 14th *April*, 1792, a *sea-letter*, or *passport*, is required, and they are regarded as synonymous. *Marshall* (*On Ins.* 406.) enumerates the documents requisite for neutral ships, and the first he calls a *passport*, *sea-brief*, or *sea-letter*. Though a distinction may have existed, in some subsequent acts of congress, between a *passport* or *sea-letter*,

ALBANY,  
August, 1811.

BARKER  
v.  
PHOENIX INS.  
CO.

[ \* 315 ]

[ \* 316 ]

ALBANY,  
August, 1811.  
BARKER  
v.  
PHOENIX INS.  
Co.

yet by a late act of congress, passed the 26th of *March, 1810*; all such distinction is done away, and they are considered as the same. An *American* vessel may be *registered*, and, as such, entitled to certain privileges, or she may be *unregistered*, and subject to pay higher duties, and yet remain *American* property. When this policy was subscribed, the defendants must have known the distinction between registered and unregistered ships, and the nature of the different documents. If they intended that the ship should have a *register*, they should have required a warranty to that effect, otherwise they must be understood as intending only that she was *American* property.

The decision in the case of *Baring v. Claggett*, may be good law in *England*, but is not law here. But Lord *Alvanley* would have decided very differently, had he been acquainted with the subsequent acts of congress, and the nature of the distinction between registered and unregistered *American* vessels, which are equally entitled to the protection of the flag of the *United States*. This vessel then sailing with a *sea-letter* or *passport*, had a sufficient document to entitle her to be respected as a neutral vessel sailing under the protection of the *United States*.

But the want of any of the proper documents is not conclusive evidence against a ship's neutrality. (*Marsh.* 408.) And it is expressly provided, by the 17th article of the treaty \*with *France*, of *September, 1800*, that if any ship shall not be furnished with such passport or certificate, as is required by the 4th article, yet if, on examination, it shall appear, from other documents or proofs, that the ship belongs to the citizens of the neutral party, she shall not be confiscated, but shall be released and permitted to proceed on her voyage.

\* 317 ]

KENT, Ch. J. delivered the opinion of the court. 1. The first objection to the plaintiff's right of recovery is, that the preliminary proofs were insufficient. The plaintiff duly and formally abandoned in writing, on the 5th of *October*, and communicated with the letter of abandonment, a copy of the letter from Captain *Corliss*, of the 11th of *July* preceding, which contained all the information that he had, at that time, received. The letter of the captain stated, that the cargo insured had been detained at *Copenhagen*, by an embargo, and that he had been obliged to leave it behind. The plaintiff, upon receiving this advice of a total loss, elected to abandon, and there is no doubt but that the fact of the detention of the cargo justified the measure. It was sufficient for the plaintiff, to have stated, as he unequivocally did in his letter, his determination and offer to abandon, together with notice of the particular loss upon which it was grounded. This was all that

the law required, to give validity to the act. (*Marshall*, tit *Abandonment*, s. 3. *Thelluson v. Fletcher*, 1 *Esp. Rep.* 73. *Emerigon*, tom. 2. 189.) The requisite documents, and proofs of interest and loss, may be communicated, says *Emerigon*, (p. 192,) at any time after the abandonment. The act of abandonment, under the general law of insurance, and the furnishing the preliminary proofs, under the special stipulation in the policy, are distinct acts, and must not be confounded. The clause in the policy, that the loss is to be paid, thirty days after proof thereof, gave rise to what is termed, in our books, *the preliminary proofs*; \*and as its object was only to furnish reasonable information to the insurer, so that he might be able to form some estimate of his rights and duties, before he was obliged to pay, it has always been liberally expounded, and is construed to require only the best evidence of the fact that the party possesses at the time. (*Talcot v. Marine Insurance Company*, 2 *Johns. Rep.* 130. *Haff v. The Same*, 4 *Johns. Rep.* 132.) But, in this case, more ample proof was furnished on the 21st of *October*, which was admitted by the counsel to have been above thirty days before the commencement of the suit. The papers which were then presented afforded sufficient proof of interest and loss, and the claim for a total loss was renewed. This claim was founded upon one plain, specific fact of loss, appearing upon all the papers, and never varied; and if it were necessary to connect the several communications, they might well be considered as one entire transaction begun on the 5th, and consummated on the 21st of *October*. But if we take the acts separately, there was a regular abandonment on the 5th of *October*, which was sufficient to satisfy the law, and to fix the technical total loss; and admitting the proof to have been then insufficient to meet the special clause in the policy, it was fully supplied on the 21st, and gave the plaintiff his right of action at the expiration of the thirty days.

2. The next objection is, that the defendants are charged in the verdict with the cargo's proportion of a general average arising from unloading and storage of the cargo, and the wages and provisions of the crew, during the time that the vessel was necessarily detained at *Copenhagen* to refit, and prior to the intervention of the embargo. That these expenses, incurred in a case of such necessity, form a general average, was settled in the case of *Walden v. Le Roy*, (2 *Caines's Cas.* 263,) and that the ship was driven into *Copenhagen* by the perils of the sea, is conclusively shown. These are expenses which the insurer is to pay, in addition to a total \*loss, and so it was lately declared by this court in *Jumel & Desobry v. The Marine Insurance Company*, (7 *Johns. Rep.* 412.)

ALBANY,  
August, 1811.  
BARKER  
v.  
PHOENIX INS.  
CO

[ \* 318 ]

[ \* 319 ]

ALBANY,  
August, 1811.

BARKER  
v.  
PHENIX INS.  
CO.

There is then no real foundation, nor even a plausible pretence, for any objection to this part of the recovery.

3. The last objection is, that the plaintiff had not shown a compliance with his warranty. The insurance was upon "The good *American* ship, called the *Rodman*." These words amount to a warranty that the ship was *American*, according to the settled construction of the phrase, both in this and in the *English* courts. (1 *Johns. Cas.* 341. 2 *Johns. Cas.* 168. 3 *Bas. & Pull.* 201. 506. 510. 514. 531. 6 *East's Rep.* 382.) A warranty that the property is *American*, undoubtedly means that it is not only so in fact, but that it shall be clothed with the requisite evidence of its *American* character, for the purpose of protection, and in reference to the law of nations, under the sanction of which the voyage in question was to be conducted. (1 *Johns. Cas.* 365. 2 *Johns. Cas.* 148.) It was proved that the ship was owned by the plaintiff, and that he was an *American* citizen; and from the case we are to conclude, that the ship had all the papers requisite for an *American* vessel, except an *American* register. The case is somewhat equivocal upon that point, but this we think to be the better construction of it. If she had not the documents required by our treaties, it ought to have been made a distinct, substantive ground of objection, at the trial. The case states, that "the defendants' counsel moved for a nonsuit, on the ground that the vessel was warranted by the policy to be an *American* vessel, and that the plaintiff had produced no proof of her being such; but that, on the contrary, it appeared, from the testimony in the cause, that she was only a sea-letter vessel, without an *American* register." This was an admission that she was a *sea-letter* vessel, though the competent proof of that fact is not disclosed in the case, and the defendants evidently placed their motion for a nonsuit on the single ground of the want of a *register*. If any thing was wanted to show a compliance with the warranty, except the register, it ought to have been expressly so stated. The presumption must be, after verdict, and upon this case, that every objection was supplied. We are then reduced to this single point, was the want of a register a breach of the warranty? At the time the policy was underwritten, there were two kinds of *American* vessels, the one registered, and the other unregistered and carrying a sea-letter, or an official certificate of ownership, and both kinds were recognised by law, as *American* vessels, though the former was entitled to higher privileges under the laws of Congress. (*Laws U. S.* vol. 6. 72.) But, in reference to the law of nations, and to security upon the high seas, both species of vessels were equally entitled to protection as *American* property. There was no use in requiring a register for

any object within the purview of the warranty. The want of it did not enhance the risk. "It is a known and established rule," says Sir *William Scott*, in the case of the *Vigilantia*, (1 Rob. 113,) "that if a vessel is navigating under the *pass* of a foreign country, she is considered as bearing the national character of that nation under whose pass she sails; she makes a part of its navigation, and is in every respect liable to be considered as a vessel of that country." What was said by Lord *Alvanley* in *Baring v. Claggett*, (3 Bos. & Pull. 201,) is not applicable, nor does it affect this doctrine. He considered that the warranty of a ship to be *American* required an *American* register, under our navigation act and the *French* treaty, and that the privilege of carrying the *American* flag, as a safe conduct among belligerent powers, was to be denied to all ships not sailing under a compliance with that act. The act he referred to was passed in 1792, (Laws U. S. \*vol. 2. p. 131,) and declared that none but registered vessels should be deemed vessels of the *United States*, entitled to the benefits and privileges appertaining to such vessels. He was not then apprized of the distinction between registered and unregistered vessels, and of the legislative recognition of the latter as *American* vessels, entitled to privileges in port, as such, under the act of 1802. The act of 1792, to which he referred, seems, by its terms, to have left unregistered vessels as alien vessels, and without the protection of the *United States*. Whether that was, or was not, the condition of such vessels at that time, is not now a material inquiry, since the vessel in question, at the time of the warranty, was not only *American* property in fact, but entitled, by her *sea-letter*, under our law, and under the law of nations, to the immunities of the *American* flag. This was equivalent to what was termed by Sir *William Scott* a national *pass*, and so it was considered in the Court of Errors, in the case of *Sleight v. Hartshorne*. (2 Johns. Rep. 531.)

The court are accordingly of opinion, that the motion, on the part of the defendants, be denied.

Motion denied.

ALBANY,  
August, 1811.  
BARKER  
v.  
PHOENIX INS.  
Co.

[\*32: 1

ALBANY  
August, 1811.

Low  
v.  
ROGERS.

Low against ROGERS and others, Commissioners, &c.

Where an inquisition taken under the 20th section of the act relative to highways, (sess. 24. c. 186.) for an encroachment on the highway, was removed into this court by *certiorari*, and

[\*322] quashed, it was held, that the appellant was not entitled to costs. It is a *casus omissus* in the statutes, as to costs. (a)

AN inquisition had been found before a justice of the peace, pursuant to the 20th section of the act to regulate highways, (sess. 24. c. 186. [1 R. S. 522, sec. 105, *et seq.*]) of an encroachment on the highway, by *Low*, the appellant, and which was removed to this court, by *certiorari*, and quashed. And the question now raised for the consideration of the court, was whether the party was entitled to costs.

*Per Curiam.* This case was removed into this court by *certiorari*, and was founded upon an inquisition taken \*under the 20th section of the highway act, (*Laws*, vol. 1. p. 596. [1 R. S. *ut sup.*]) by which the jury had found that the appellant had encroached upon the highway, and the inquisition has been now quashed by this court.

The inquisition below was not a *judgment, or order*, made for the *benefit of another person*, within the act relative to suing out writs of *certiorari*. (*Laws*, vol. 1. p. 192.) It seems to be a *casus omissus* in our statute book, as to costs. There is no provision giving costs, or damages, either one way or the other, when such a proceeding as that below is removed into this court by *certiorari*. The act regulating the suing out writs of *certiorari* is the only one making provision for costs in cases analogous to this, and that is done by requiring the party suing out the writ, to enter into a recognisance to pay costs. There is a similar provision in several *British* statutes relative to proceedings by *certiorari*.

Costs denied.

(a) A *certiorari* will not lie to a justice of the peace to bring up the proceedings had under the revised statutes, (1 R. S. 521, *et seq.*) concerning encroachment on highways. *Pugsley v. Anderson, 3 Wendell, 468.*

ALBANY,  
August, 1811.

PUMPELLY

v.

CROSBY

PUMPELLY *against* CROSBY and others.

SHERWOOD, for the defendants, moved to set aside an inquest, taken at the last circuit in *Tioga* county, and all subsequent proceedings, for irregularity. He cited 5 *Johns. Rep.* 235, 236. 2 *Wils.* 74.

The irregularity relied upon, was the want of the name of *counsel* to the *replication*. The plea was a special plea of payment to the holder and payee of a promissory note, before it was endorsed to the plaintiff; and a *general replication*, denying the payment.

A general replication to a special plea need not be signed by counsel.

*H. Bleecker*, contra.

*Per Curiam.* The motion must be denied. The case \*of *Simson v. Neal*, (2 *Wils.* 47,) on which the defendants' counsel relies, has been overruled in the case of *Hubert v. Lord Weymouth*, (2 *Black. Rep.* 816,) and there can be no more reason for requiring the signature of counsel to a *general replication* than to a general plea. When the replication consists in a mere denial of the plea, without alleging any new matter therein, it need not be signed by counsel. This appears to be the settled practice of the court of K. B. (*Seller*, 327. *Impey's K. B. Prac.* 263.)

[\* 323]

Motion denied.

243

ALBANY,  
August, 1811.

ADAMS  
v.

SUPERVISORS  
of Columbia.

ADAMS against THE SUPERVISORS of Columbia County.

An *order*, signed by two *justices*, to an overseer of the poor, to provide for the maintenance of a pauper, under the first section of the act of the 24th March, 1809, (*sess. 32. c. 90.*) is valid. And though

[ \* 324 ]

such order does not recite that the justice and overseer inquired into the state and circumstances of the pauper, before giving the order, such an inquiry will be intended to have been made and implied from the order. The justice and overseer need not make the inquiry together, for the order is not to be their joint act.

Matters of form in orders for the relief of paupers, are to be overlooked, and the justice has a reasonable discretion, as to the nature and extent of the weekly allowance, and if the pauper be sick or wounded, medicines

and the attendance of a physician, are a reasonable charge; but all the charges of maintaining the pauper must be adjusted and paid, in the first instance, by the overseers of the poor, who are responsible to the persons rendering the assistance. A *mandamus* will not lie, at the instance of the party, to compel the supervisors of the county to audit and pay the account of such charges. The supervisors are only to pay such accounts as have been adjusted and paid by the overseers, in pursuance of the justice's order. (a)

(a) *Vide Everts v. Adams*, 12 Johns. Rep. 352. *Ex parte, Dow*, 1 Cowen, 205. *People v. Supervisors of Cayuga*, 2 Cowen, 530. *Ex parte, Overseers of Gates*, 4 Cowen, 137. *Gowley v. Allen*, 5 Cowen, 644. *Flower v. Allen*, *id.* 654. *Palmer v. Vandenberg*, 3 Wendell, 193. *People v. Supervisors of Oswego*, 2 Wendell, 291

A RULE was obtained at the last term, requiring the defendants to show cause why a *mandamus* should not issue, to compel them to audit an account of the plaintiff's for medicine and attendance, as a physician, on one *Nathaniel Turner*, a pauper.

*E. Williams*, for the defendants, now showed cause; and from the affidavits which were read, the following facts appeared. On the twenty-third *April*, 1810, one of the overseers of the poor of *Hudson* applied to *Adams*, as a physician, to attend on the *pauper*; and *Adams* attended, \*from time to time, until the seventeenth *July*, 1810, and presented his account, amounting to ninety-four dollars and seventy-three cents, to the defendants, who refused to audit it.

Two justices of the county made an *order*, under their hands and seals, upon the overseers of the poor of *Hudson*, to provide for the pauper from the twenty-third of *April*, 1810, for his weekly board, at two dollars and fifty cents, with other necessaries, for clothing, and also such medicine and attendance for the recovery of the pauper, as should be thought necessary.

One of the overseers stated, that the pauper had no settlement within the state; that he was not in a situation to be removed, and that he supported him, pursuant to the *order* of the justices, and directed the plaintiff to attend him.

Some of the supervisors, in their affidavits, stated, that one of the justices who made the order was examined by the board, and stated that the justices, or either of them, did not, with the overseers, visit the pauper, to his knowledge.

*Van Buren*, for the plaintiff.

*Per Curiam.* The act of 24th March, 1809, (*sess. 32. c. 90.* [1 R. S. 624. s. 42]) makes it the duty of the overseers, or one of them, of the city or town in which any pauper

and the attendance of a physician, are a reasonable charge; but all the charges of maintaining the pauper must be adjusted and paid, in the first instance, by the overseers of the poor, who are responsible to the persons rendering the assistance. A *mandamus* will not lie, at the instance of the party, to compel the supervisors of the county to audit and pay the account of such charges. The supervisors are only to pay such accounts as have been adjusted and paid by the overseers, in pursuance of the justice's order. (a)

happens to be, who requires relief, and hath no settlement within the state, to inquire, together with any justice of the county, into the condition of the pauper, and if it shall appear necessary to the overseer or justice, the justice is to give an order on the overseers for an allowance to the pauper, and such allowance is to be a county charge.

The first question in this case is, whether the order was valid. The act does not require two justices to unite in making the order, but if it be made by two, or more, instead of one, *that* circumstance cannot weaken it, nor *\*are* the overseers, or either of them, to unite in making it, for the order is to be made in writing, by the justice upon the overseer. But the act requires, as a preliminary step, that the justice and overseer shall inquire into the condition of the pauper, and if it shall appear to them that relief is necessary, the order is to be made. The order does not aver, by way of recital, that those steps were taken; but they are to be intended to have been taken, and are implied in the order itself. The act does not prescribe any formal evidence of the fact of its having *appeared* to the overseer, as well as the justice, that the pauper stood in need of support. It is to be necessarily inferred to have so appeared to the overseers, as they did not, when called upon, show any sufficient cause to the contrary. They must have conceded the fact. Nor was it requisite that the overseer and justice should have inquired *together*, into the condition of the pauper, because they are not to do any joint act. The order is to be the exclusive act of the justice, and the cases which were cited to this point are not applicable. The order is, of itself, evidence that the overseers and justices had all seen the pauper, for he had been before them, and the inquiry by each, into his circumstances, is necessarily to be inferred. There was no formal evidence of that fact required by the statute, and if it is to be reasonably implied, it is enough. The case of *The King v. The inhabitants of Woodsterton*, (2 *Barnard.* 207. 247,) shows that objections as to matters of form, in an order for the relief of a pauper, are to be overlooked, and humanity dictates that such orders should be liberally treated. All that one of the justices stated before the board of supervisors, was, that there was no *joint* inquiry into the state of the pauper. The facts on the face of the order, prove, that each party must have made the inquiry, and the debility and helplessness of the pauper must have appeared to all, for it is nowhere, nor by any person, denied.

\*The second objection is as to the extent of the allowance. It is not only a weekly sum, but necessary medicine and attendance. The act says, the justice is to make "such

ALBANY,  
August, 1811.  
Adams  
v.  
SUPERVISORS  
of Columbia

\* [ 325 ]

[ \* 326 ]

ALBANY,  
August, 1811.

ADAMS  
v.  
SUPERVISORS  
of Columbia.

allowance weekly, or otherwise, as the necessities of the pauper shall require." This gives a reasonable discretion to the magistrate, as to the mode and nature of the allowance. If the pauper be sick, common sense and humanity dictate that medicine and attendance are as necessary as food and clothing, and the precise amount of such medicine and attendance could not be fixed beforehand. It must depend upon the circumstances of the case. The account exhibited, as well as the order of the justices, shows the distressed condition of the pauper. The justices in their order say, that "he must inevitably perish unless timely relieved," as he had a white swelling on his knee; and it appears that the disorder terminated in the amputation of his thigh. If an order on the overseers for medical aid could not be legally made in such a case, what was to be done? Did the statute mean that the man should be left to the aid of private compassion, or to perish? The law ought not to be so narrowly construed, and the order is to be deemed sufficient to cover the expenditure in question.

The third and only remaining question is, as to the regular mode of adjusting and exhibiting the charge to the board of supervisors. It is to be exhibited as a charge paid by the overseers, under the order of the justice. The account exhibited, though signed by the overseer, has never been paid by him, nor is it stated that the overseer had even examined and admitted the account, as just and correct. It was handed by him to the supervisors, just as it had been presented to him by the physician. He was only the agent of transmission. The overseers are not the complainants in the present case. It is *Adams*, the physician, who complains, and sues for the *mandamus*. But the persons who afford assistance to the \*pauper are to look to the overseer, and he is to pay them. The statute says that the order "shall be a sufficient voucher for the payment of so much money by the said overseer." The supervisors of the county are not the board to ascertain whether the services have been actually and faithfully rendered to the pauper. That must be adjusted by the overseers of the poor, who are, in the first instance, responsible to the persons rendering the assistance. The supervisors were only to pay such accounts as the overseers had adjusted and paid, *in pursuance of the order*. As the account in question had never been adjusted, allowed and paid, by the overseers of *Hudson*, the supervisors, for that reason, were not bound to notice it, and on that ground alone, the court refuse to interfere. But we have given our opinion on the merits of the case, so that when the account shall have been liquidated and settled by the overseers, and duly exhibited by them to the

[ \* 327 ]

supervisors of the county, it may be paid, without the necessity of an application to this court.

Rule refused.

ALBANY,  
August, 1811.

SATTERLEE

v.

SATTERLEE.

—  
SATTERLEE, Administrator, *against* SATTERLEE.

N. WILLIAMS, for the defendant, moved to set aside the default entered in this cause, for want of a plea, and all subsequent proceedings, for irregularity.

The defendant had pleaded the *general issue* and *plena administravit*, a copy of which was, in due season, delivered to the plaintiff's attorney, but the pleas not being signed by counsel, the plaintiff's attorney treated them as a nullity, and entered a default for want of a plea.

*Huntington*, contra, said, that the plea being double, ought to have been signed by counsel, and cited *Dubois v. Philips*. (5 *Johns. Rep.* 235.)

\**Williams* observed, that neither of the pleas required a counsel's hand, and cited *Tidd's Practice*, 622. 1 *Sellon*, 326.

[ \* 326 ]

*Per Curiam.* This case comes within that of *Dubois v. Philips*, (5 *Johns. Rep.* 233,) and the double plea of *non assumpsit* and *plene administravit*, was not good, without the signature of counsel. Had the last plea been singly pleaded, it need not have been signed by counsel; but double pleas must be so signed, according to the practice of the Court of *K. B.*, which is the practice of this court in those cases in which a different practice has not been established. (1 *Tidd*, 621, 622. 2 *East*, 225.) We grant the motion to set aside the default, and to let the defendants in to plead, upon payment of costs.

247

*Double* *pleas*  
must be signed  
by counsel.

*Plene admini-*  
*stravit*, singly  
pleaded, need  
not be signed  
by counsel; but  
if joined with  
the *general is-*  
*sue*, the *plea* is  
*double*, and  
must be signed  
by counsel.

ALBANY,  
August, 1811.

In the matter of  
the  
M'Dowles.

In the matter of HUGH M'DOWLE and JOHN M'DOWLE,  
Infants.

An infant cannot be bound an apprentice, unless he is a party to, and executes the deed or indenture. Where the father of an infant and the master executed an indenture, binding the infant to the master, it was held,

[\*329] that the indenture (though the father was bound) was not binding on the child; and that the infant alone could take advantage of any defect in the indenture. And the infant being brought up on *habeas corpus*, the court refused to order the infant to be delivered to the father, there being no evidence of improper restraint on the part of the master, but gave the infant leave to go where he pleased. (a)

WRITS of *habeas corpus* were awarded, in the last vacation, by the recorder of Albany, to *Nathan Spier*, of the town of *Watervliet*, to bring up the body of *Hugh M'Dowle* and to *Nathan Slosson*, of the same place, to bring up the body of *John M'Dowle*. The recorder certified the writs and returns into this court, and recognised the parties to appear at this term, and produce the infants. They now appeared, and the infants were produced in court.

The return by *Nathan Spier* stated, that on the third of *May*, 1808, *Matthew M'Dowle*, father of the infant, sealed and delivered to him an indenture, which was set forth, by which he bound his son *Hugh*, then six years of age, to *Nathan Spier*, (a member of the society called *Shakers*.) to be by him, or under his care, fed, clothed, taught to read and write, and in the carpenter's and joiner's trade, provided circumstances would admit, and the boy inclined, and to instruct him in other matters, according to his faith, and the faith and practice of the church and society to which he belonged, until the age of twenty-one. If the boy inclined to depart before, the father agreed to take him away, on being duly notified, &c.

The indentures were executed by *Spier*, and the father of the infant. The return further stated, that the infant had never manifested any desire to depart, but an inclination to stay, though on the twentieth of *December* last, the father and *James M'Dowle* had fraudulently and forcibly taken away the boy and kept him six weeks; that he, *Spier*, had performed the covenants in the indenture on his part, and was willing to perform, &c.

The return to the other writ was similar; it stated that *John* was bound by his father on the twenty-third of *April*, 1808, the infant being then eight years old, and that he was to be taught the trade of a blacksmith, &c.

A petition was also presented, signed by the infants, one being eleven, and the other eight years old, praying that they might now be permitted to execute the indentures.

*Rodman*, for the infants, contended that the indentures were void. The act concerning apprentices and servants

(a) Where a *habeas corpus* is directed to a private person to bring up an infant, the court are bound *ex debito justicie* to set the infant free from improper restraint, but whether they shall direct it to be delivered over to any particular person, rests in their discretion, under the circumstances of the case; even though the application proceed from the father of the infant. *Matter of Waldron*, 13 Johns. Rep. 418.

*sess.* 24. c. 11. s. 8. 2 R. S. 154. sec. 1) requires the infant to be a party to the deed; he must be bound by indenture of his or her own free will; and the infant cannot be bound unless he executes the indenture. An infant cannot be bound an apprentice without deed, and that must be, according to the statute, by indenture. (1 Black. Com. 426. 1 Salk. 68. 1 Burn's Just. 88. (20th edit.) Ld. Raym. 1117.)

\*In the case of *The King v. Cromford*, (8 East, 25 S. P. 2 Salk. 479. 1 Bott. 522,) Lord *Ellenborough* said, that a contract between the father and the master, under seal, not executed by the infant, not being a legal apprenticeship, was not binding on the son or father for him, but the service was voluntary.

Again, the word *apprentice* must be used in the indenture, otherwise it is void. (Dalton, 58.)

*P. Van Vechten* and *A. Van Vechten*, contra. This is an application on the part of the father, who has voluntarily parted with all his authority over his child. It is not necessary to show that the indenture was within the statute. It is sufficient, if it is good at the common law; for a father has a right, by common law, to bind his child. (4 *Comyn's Dig.* 579. *Just.* (B. 55.) But the statute cannot require the infant to sign and seal the indenture, for he may be so young as not to be able to sign it. All that can be required is, that the infant should consent to the binding, and that consent may be by parol. (2 *Term Rep.* 726.)

It has been laid down in several cases, that it is not necessary that the word *apprentice* should be used in the indenture. (8 *Term Rep.* 379. 1 *East*, 531. 4 *East*, 298.)

The father here has no claim or right to the child, after having voluntarily parted with his power and authority. The object of the writ of *habeas corpus* is to remove illegal or improper restraint. It is granted at the instance of the party aggrieved. Infancy is a personal privilege, and can be taken advantage of only by the infant himself. (5 *Johns. Rep.* 261, 162. 1 *Hen. Bl.* 515. *Doug.* 500. 5 *Term Rep.* 715.) Besides, the contract itself provides an adequate remedy for the infant, for he may leave his master whenever he pleases. There is no evidence of any coercion used by the master, to keep the infant, against his inclination.

*Per Curiam.* Two objections are taken to the validity of the indenture stated in the return; 1. That it is not executed by the infant; 2. That the word "apprentice" is not inserted in the deed.

\*The first objection is founded on the words of the statute, (*Laws*, vol. 1. p. 186. [2 R. S. 154. s. 1]) which evidently

ALBANY  
August, 1811.  
Matter of  
M'DOWLES.

[\*330]

[\*331]

ALBANY,  
August, 1811.

Matter of  
M'DOWLES.

requires the deed to be executed by the infant, as well as by his parent or guardian. At common law, a parent may bind his infant an apprentice, but the statute must be considered as controlling the common law, in this respect, and as requiring the infant to be a party to the deed. The infant, in the present case, is not therefore bound, and the question is as to the relief which ought to be granted upon the present writ.

The father who, on his part, executed the indenture with the master, sues out the writ. There is nothing before the court to show any improper treatment of the infant, nor that the party to whom the father intended to bind him has not hitherto faithfully performed the stipulations in the indenture. This is not a case then in which the father has any equity, or any right to complain. He may be bound still by the covenants in the indenture, though the infant is not. It is for the infant alone to take advantage of the defect, and if he does not choose to do it, he may waive the defect, and avail himself of the benefit of the apprenticeship. All that the court are required to do, under the present writ, is to see that the infant is not restrained against his will. The course and practice of the *English* courts, on the like occasions, is well settled. It was observed by Lord *Mansfield*, in the case of *Rex v. Delaval and others*, (3 *Burr.* 1434,) that, "in cases of writs of *habeas corpus* directed to private persons to bring up infants, the court is bound, *ex debito justicie*, to set the infants free from any improper restraint; but they are not bound to deliver them over to any body, nor to give them any privilege. This must be left to their *discretion*, according to the circumstances of the particular case." And in that case, the *K. B.* refused to deliver the infant to her father, but left her at liberty to go where she would. In the case of *Rex v. Smith*, (2 *Str.* 982,) a boy under 14 was brought up on *\*habeas corpus*, sued out by his father, to obtain possession of him from his aunt; but the court merely left the boy at liberty to go where he pleased, and the boy chose to stay with his aunt.

In the present case, then, the court can only declare, that the infants are at liberty to go where they please. They may go and put themselves under the protection and care of their father, or they may return to the service of their master.

*N. B.* The *Chief Justice* then asked the infants where they chose to go, and they answered that they wished to return to their masters. The counsel for the masters suggesting that violence might be used on the part of the father, to gain possession of the boys, the court directed a constable to attend them. Afterwards, the counsel for the father sug-

gested to the court, that improper means and constraint had been used by the masters and others, belonging to the society of *Shakers*, to induce the children to declare their election to return, and that the answers were not freely given by them to the court. The parties then agreed that the boys should be privately examined by three gentlemen of the bar as to their election; and the court appointed three counsellors to examine the boys, in order to discover their free wishes. The counsellors, after making the inquiry, reported to the court, that the boys, after being carefully informed of the purpose of the inquiry, expressed a decided and unequivocal desire to return to their masters, and a strong and unaccountable repugnance to go back to their father. The court thereupon ordered the boys to be delivered to their masters, and directed an officer to attend and protect them in their return, according to their choice.

It was mentioned, that the mother of the children, now deceased, had been a member of the society called *Shakers*.

ALBANY,  
August, 1811.  
Hewson  
v.  
Deygert.

\*HEWSON against DEYGERT.

[ \* 333 ]

HILDRETH, (Attorney-General,) in behalf of *David I. Zeilly*, and *Joseph Spreaker*, moved, that all sales of lot No. 4, in *Van Slyck's* and *Depoyster's* patent, in the town of *Palatine*, in the county of *Montgomery*, under a *fiere facias* issued in the above cause, be postponed indefinitely, or forbidden.

In the affidavits which were read, the following facts were stated. On the 6th *February*, 1811, *Zeilly* and *Spreaker* purchased, for 1,670 dollars, the lot No. 4, at a sheriff's sale, under an execution issued in *February* vacation, 1810, in the above cause, and under another execution issued in *August* vacation, 1810, at the suit of *I. & A. Kane*, against *Deygert* and one *Henry Deill*. At the time of the sale, the sheriff had in his hands, another execution in favor of *Robert R. Henry* against *Deygert*, on a judgment obtained subsequent to the other two. The proceeds of the sale amounted to

due on the second instalment, and the same tract of land was again taken by the sheriff, and advertised for sale. *A.*, the purchaser under the first sale, applied to the court, on affidavit, to stay all further sale of the land; but the court refused to interfere, saying, the party who has title must be left to his legal remedy. (a)

But it seems, that the land in question, in the hands of the purchaser under the first sale, is no longer bound by the judgment; it being presumed that the land sold for its value, and the purchase is to be considered absolute, in regard to the lien or judgment; that the proper course in all sales of real and personal property, is to sell so much of the property charged as will probably satisfy the execution, and which can conveniently and reasonably be sold separately.

(a) Vide *Cairns v. Smith*, *infra*, 337

ALBANY,  
August, 1811.

HEWSON  
v.  
DEYGERT.

[ \* 334 ]

about 500 dollars, over and above the amount of the two first executions, and a considerable part of the 500 dollars had been applied towards satisfying the third execution. At the time of the sale, *Zeilly* and *Speaker* did not know that more money was or would become due on the first judgment. *I. & A. Kane* are alone interested in all the judgments. The same lot has again been advertised, under an execution issued on the first judgment, to collect another instalment due on the judgment which has become due since the sale above stated. *Zeilly* and *Speaker*, \*since their purchase, and before the present execution issued, had bargained and sold the lot.

The affidavit, on the part of the plaintiff, stated, that the execution in this cause, is to collect the half of what was due on the two first instalments of the bond on which the judgment was entered; that the lot sold is worth 7,000 dollars, and that it was understood from *Zeilly* and *Speaker*, that they purchased for the benefit of the defendant. The present execution has been issued for half of the instalment due, or about 509 dollars; *Deill*, the other defendant, having engaged to pay the other half, and that the defendant has no other means to pay what is due.

*Bleecker and Sedgwick*, for the plaintiff.

*Per Curiam.* It is not requisite that the court should interfere in this summary way, by rule, to prevent the sheriff from selling property on execution which is alleged not to belong to the defendant. The party having title has his remedy by action, if he sustains injury, and no sale by the sheriff will affect the title to lands not subject to sale under the execution. But though the motion is denied on this ground, the court think proper to intimate their impression on the question which has been raised, lest the parties may be misled by their silence. They give no decided opinion, as the point may possibly hereafter come before them in a regular course of litigation; but, under their present view of the subject, they consider that the lands in question, in the hands of the purchasers are no longer bound by the judgment. It is to be presumed, that the lands sold, under the former execution, for their value, and the purchase is to be considered as absolute, in respect to the lien or judgment under the authority of which they were sold. The sale extinguished the lien as to the lands sold. The proper course, both on sales of real and personal property, is to \*sell only so much of the property charged, as will probably satisfy the execution, and which can conveniently and reasonably be sold separately. A party who sells under a power, is not bound to sell, at once, all the pro-

[ \* 335 ]

party bound by the power, and in many cases it would be an act of great oppression to do it. (*Co. Litt.* 113. a. 1 *Caines's Cases in Error*, 18. *Noy*, 59.) But if he does do it, he ought not to be permitted to sell the property a second time, to satisfy new and growing instalments. If he wishes not to exhaust at once his resources under the lien, he should sell no more of the estate than was requisite to satisfy the instalment due.

Motion denied.

ALBANY,  
August, 1811.  
THE PEOPLE  
v.  
HARDEN-  
BERGH.

### THE PEOPLE *against* HARDENBERGH and others.

SUDAM, in behalf of *Johannis G. Hardenbergh*, moved to set aside the attachment issued in this cause, for the non-payment of costs in a certain suit in ejectment.

*L. Elmendorf*, contra.

Numerous affidavits were read on both sides; but as enough appears from the opinion delivered by the court, it is unnecessary to detail the facts.

*Per Curiam.* The ejectment suit of *Jackson, ex dem. Jonas Harsbrouck and Johannis G. Hardenbergh, v. John Schoonmaker*, terminated in favor of the defendants; and the costs were taxed at 684 dollars, and 6 cents. The defendant, afterwards, on the 1st of April last, entered into an agreement with *Johannis G. Hardenbergh*, one of the lessors, to collect a moiety of those costs of the other lessor, and settled with him for one moiety, and \*gave him a discharge in full. Notice of this proceeding was immediately communicated to Mr. *Elmendorf*, the defendant's attorney, and notwithstanding that notice, he has since sued out an attachment, for a moiety of the taxed costs against *Johannis G. Hardenbergh*, who now applies to have the attachment set aside. It is admitted by Mr. *Elmendorf*, that the fees of the jurors, witnesses, surveyor and shower, as taxed in the bill, amounted to 315 dollars, and 53 cents, and that he has not advanced any part of those disbursements, nor does it appear that he has made himself personally responsible for them, or any part of them. This settlement of the costs by the defendant himself, in whose favor they were awarded, being made previous to any notice from the attorney prohibiting the

A settlement of the costs by the defendant in a suit, in whose favor they are awarded, with the plaintiff is valid, if made without notice from the defendant's attorney of any claim or lien, and without a *vy* collusion, to deprive the attorney of his costs. The attorney which an attorney may have on his client for extra services, or for counsel fees, make no part of the at-

[\* 336]  
torney's *lien* upon the taxed costs, or which the court will protect against the interferences of his client.  
(a)

(a) *Vide Martin v. Hawks*, 15 Johns. Rep. 405. *Power v. Whalley*, 1 Cowen, 172.

ALBANY,  
August, 1811.

CAIRNS  
v.  
SMITH.

settlement, is valid, according to the case of *Pindar v. Morris*; (3 *Caines*, 165;) unless it appears to have been done collusively to cheat the attorney. But it would be going too far to infer such a charge from the facts in this case, considering that nearly a moiety of the bill was not due to the attorney in his character of attorney, but belonged to the defendant, who is responsible for those disbursements. The small surplus remaining of the moiety, after deducting those disbursements, was no object that could justify the imputation of collusion or fraud. The claims which the attorney may have upon the defendant for his extra services, and for counsel fees, constitute no part of an attorney's lien upon the taxed costs, or which the court will protect against the interference of his client.

The motion to set aside the attachment, as against *Johannes G. Hardenbergh*, is, therefore, granted.

[\*337]

\*CAIRNS and LORD against SMITH.

It is irregular to issue a second execution, until the first is returned. Though where an execution has issued unadvisedly, it may be withdrawn, before any thing is done upon it; yet where a sale had been made under an execution, and the sheriff died without executing a deed, it was held irregular to withdraw and suppress the execution, and issue a second to the new sheriff, for the purpose of selling the property a second time. (a)

Whether the sale on the first execution was bona fide, or

*Russell*, contra.

Several affidavits were read.

1. *Scidmore*, a deputy of *Bull*, late sheriff of *Saratoga*, swore, that executions were lodged in his hands, in the above cause, and in two other causes against the same defendant, by *J. Cramer*, attorney, with directions to advertise for sale the real estate of the defendant in *Ballston*; that he accordingly advertised the same for sale, and the same was sold to *Benjamin Smith*, for 20 dollars, who purchased for one *Shaw*, and *Smith* paid the money to the deputy.

2. *Shaw* swore that he purchased of *Smith* his title under the sale; that the same lands are again advertised for sale under a second execution, issued in the above suit; that *Bull*, the sheriff, died, without executing any deed to the purchaser, and his executors refuse to execute a deed.

3. *J. Mandeville* swore, that the present sheriff told him

fraudulent, the court will not decide on motion.

(a) *Vide Dow v. Burt*, 1 *Wendell*, 88.

that the execution delivered to him in the above cause by *Scidmore*, he returned to the attorney, at his request, and that the attorney either altered the *testo* and *return* of the execution, or issued a new execution, and requested him to advertise the same property again for sale; and that the execution in this cause was the eldest of those in the hands of *Scidmore*, the deputy.

\*4. *Cramer*, the attorney, swore that a *fieri facias* in the above cause was issued to the late sheriff for 442 dollars and 43 cents; that the property was bid off, at the sale, by a son of the defendant, for 20 dollars; that a short time before the death of *Bull*, the deputy sheriff informed him, that no money had been paid on the sale, or any deed demanded; that since the death of *Bull* he had issued another *fieri facias* in the cause; that the property was worth 1,500 dollars, and the defendant was insolvent.

ALBANY,  
August, 1811  
CAIRNS  
v.  
SMITH.

[ \* 338 ]

*Per Curiam.* It is irregular to issue a second execution until the first is returned. ( *Gilbert on Executions*, 24. 1 *Salk.* 318. 2 *Tidd's K. B. Prac.* 934.) The court ought to know what proceedings have been had upon the first execution before they award another. This rule is necessary to prevent abuse and oppression, though we do not mean to apply the rule to a case in which an execution may have issued unadvisedly, and the party withdraws it, before any thing is done. The rule is more necessary to be observed, when it appears that a sale has actually been had under the first execution. (2 *Tidd*, 912.) In this case there was a sale, and a purchaser claims the benefit of such sale. Whether the sale was *bona fide* and valid, or fraudulent and void, is a question which cannot be tried upon the present motion; nor can it be permitted to the attorney who issued the execution to determine that point for himself. By recalling and suppressing the first execution, after a sale under it, he deprives the purchaser of his right, if any right was legally acquired under the first sale. An execution is said to be an entire thing, and when once begun must be completed, and perhaps the executors of the late sheriff are the proper persons to return the first execution, so that the parties may respectively be enabled to take such steps thereon as their rights may require. If a sheriff dies after having taken goods into his possession, his executors must complete the sale. (1 *Black. Rep.* 69.) But without giving any opinion as to the course and effect of the proceedings under the first execution, it is sufficient, in the present case, to declare, that the second execution was irregular, and that the motion to set it aside ought to be granted with costs.

[ \* 339 ]

Motion granted.

255

ALBANY,  
August, 1811.

—  
M'LEAN

v.  
WHITING.

M'LEAN against WHITING.

Separate suits were brought against *A.* and *B.*, two joint obligors on a bond, payable by instalments, and a *ca. sa.* was afterwards issued against *B.* for the costs taxed in the suit against *him*, and not for the instalment, from which he was discharged after paying the costs.

It was held, that the discharge of *B.* from the *ca. sa.* for the costs, was no discharge of *A.*, the co-obligor, nor a satisfaction of the debt

[\* 340] for which *A* was imprisoned. (a)

*H. BLEECKER*, for the defendant, moved that he be discharged from imprisonment, on a *ca. sa.* issued in this cause.

The affidavit of the defendant stated, that he was sued by bill, on a *bond* executed by him and *Daniel Powers*, by which they were, jointly and severally, bound to the plaintiff in 450 dollars, conditioned to pay 221 dollars and 87 cents, by instalments of 55 dollars each; that a judgment was confessed for the penalty; that only one instalment was due when the suit was commenced, and two only when judgment was entered; that the defendant was taken on a *ca. sa.* for 117 dollars; that a suit was commenced upon the same bond against *Powers*, and judgment entered, by confession, for the penalty; that several bills of costs were taxed in the suits and that since the defendant had been taken on the *ca. sa.* *Powers* had been also taken on a *ca. sa.*, and the attorney for the plaintiff had received from him satisfaction of the execution, either in money or its equivalent, and had discharged him from imprisonment.

*Paine*, contra, read an affidavit, which stated that several judgments were obtained against the defendant and \**Powers*; that a *fi. fa.* was issued against *Powers*, for the two instalments which were payable, and for the costs taxed against him, on which *nulla bona* was returned; that on the *ca. sa.* against the defendant, the sheriff was ordered to collect the said two instalments and interest, but no part of the taxed costs; that, afterwards, a *ca. sa.* was issued against *Powers* for the costs taxed against him only, and the amount of these only was the sheriff ordered to collect with his fees, but no part of the instalments; that *Powers*, on paying the costs, was discharged from custody, but no further release was intended.

*Per Curiam.* The defendant, *Whiting*, is charged in execution, for two of the instalments, but not for any costs, and *Powers* was charged in execution only for the costs of the suit against him. His discharge from these costs does not, and ought not, to affect the execution against *Whiting*; for the demands were distinct, and *Whiting* was never answerable for those costs. The rule that a release of one co-obligor from his debt, or a discharge of one co-obligor from execution, should enure as a release or discharge of all, is founded upon

(a) *Vide Bank of Lansingburgh v. Russell* 5 Wendell, 128.

the just principle, that the party should not receive more than one satisfaction for the same debt, but that principle is inapplicable to this case. The discharge of *Powers* from his costs was no satisfaction of the debt for which *Whiting* was imprisoned ; the motion is therefore denied.

Motion denied.

ALBANY,  
August, 1811  
SHOTWELL  
v.  
DANIELS.

\*SHOTWELL against DANIELS.

[ \* 341 ]

HARRIS moved for a rule against the judges of the Court of Common Pleas, or Mayor's Court, of the city of New-York, to show cause why an attachment should not issue against them, for not making a return to a *habeas corpus*, issued to remove a cause from that court into this court.

The declaration in the court below contained but one count, on a promissory note, dated the 19th of September, 1810, drawn by the defendant for 208 dollars and 56 cents, payable six months after date, and concluded with demanding damages to 300 dollars. The cause was noticed for trial, in the court below, on the third *Monday* of *July* last ; and on the first day of the court, before the calling of this or any other cause, the defendant's counsel moved for leave to file a *habeas corpus* to remove the cause, which had been duly allowed by the recorder on the 15th of *July*, pursuant to the statute ; and leave being granted, the writ was filed in open court with the clerk. The next day the plaintiff moved to bring on the cause to trial, and the recorder, the presiding judge of the court, permitted the plaintiff to proceed and take a verdict against the defendant.

*Per Curiam.* The act (sess. 24. c. 13 [2 R. S. 389, sec. 1. 7. Id. 390. sec. 14]) says, that no personal action depending in any Mayor's Court, &c. where the sum mentioned in the condition of the bond or specialty with interest, or the matter or thing in demand, shall not exceed 250 dollars, shall, before judgment, be stayed or removed, &c. It appears from the face of the declaration, that the demand of the plaintiff was certain, and that he could not, in any event, recover the sum of 250 dollars. The court below were, therefore, right in \*disregarding the writ of *habeas corpus* ; but, in ordinary cases, where, upon the face of the declaration, the sum in demand is uncertain, and might exceed the sum of 250 dollars, the amount stated in the conclusion must be considered as the test of the plaintiff's demand, and the *habeas corpus* ought to be returned.

Where it appeared from the face of the plaintiff's declaration in the Court of Common Pleas, that the demand was certain, so that he could not, in any event, recover 250 dollars, though the damages demanded in the conclusion of the declaration were 300 dollars, and the court proceeded in the cause, notwithstanding the defendant had filed in open court a *habeas corpus* to remove the cause, which had been duly allowed ; this court refused to grant an attachment against the judges of the Court of Common Pleas, for not obeying the writ. But where the demand appears to be uncertain, so that the plaintiff might

[ \* 342 ]  
recover above 250 dollars, the writ must be obeyed and returned.

Rule refused.

ALBANY,  
August, 1811.

NEWCOMB  
v.  
BUTTERFIELD.

NEWCOMB, Supervisor, &c. *against* BUTTERFIELD.  
SAME *against* WAIT.

Where a trespass is committed on lands reserved by the state for the support of the gospel and schools, or on lands belonging to the state, the suit must be brought in the name of the *overseers of the poor* of the town in which the trespass is committed, in order to entitle the plaintiff to recover *treble damages*, under

[\* 343] the act of the 25th April, 1805. (Sess. 28. c. 94.)

If the suit is brought by the *supervisors*, under the act of the 5th February, 1810, (sess. 33 c. 5.) or the act passed the 11th April, 1808, (sess. 31. c. 18.) the plaintiff is not entitled to *treble damages*. (a)

In order to recover *treble damages*, in cases where the party is entitled to them, the declaration of the plaintiff should refer to the act, that the defendant may be apprized of the extent of his demand, and the jury must find him guilty of the trespass alleged, and assess the *single value* of the timber or trees cut, and this finding of the jury must be endorsed on the *postea*, on the return of which the court will, on motion, *treble* the damages. (b)

(a) By the provisions of the *Revised Statutes*, a penalty of twenty-five dollars for every tree cut and carried away from the public lands, is imposed upon the trespasser. (1 R. S. 909. sec. 74.) Treble damages are given for similar trespasses upon the lands of individuals and towns. (2 R. S. 338. sec. 1.) In the former case, the district attorney may proceed either by suit or indictment, to recover the penalty, and the proceeds, after paying the fees of the witnesses, are directed to be paid into the county treasury. (1 R. S. 909. sec. 73. 75.) In the latter, the damages are to be sued for and recovered by the individual, or town, upon whose lands the trespass is committed. (2 R. S. 338. sec. 1.)

(b) *Brown v. Bristol*, 1 Cowen, 176. *Livingston v. Platner*, *Id.* 175. *Benton v. Dale*, *Id.* 160. (*Bekman v. Chalmers*, *Id.* 584.)

from which it can be made apparent that the jury have not found treble the value of the timber. The jury may give damages for breaking the *close* of the plaintiff; and how do the court know whether the damages found are to the value of the timber only?

ALBANY,  
August, 1811  
NEWCOMB  
v.  
BUTTERFIELD

Again, this suit is brought by the supervisors, in pursuance of the act vesting certain powers in the supervisors and assessors in the several towns in *Clinton* county, (sess. 33. c. 5,) passed the fifth *February*, 1810, which vests in them the same powers as the supervisors and commissioners possessed under the act relative to the county of *Onondaga*, passed the twenty-third *March*, 1798, (sess. 21. c. 48,) relative to gospel and school lots, &c. and which was made general, and extended to all the towns in the state, by the second section of the act passed the eleventh *April*, 1808. (Sess. 31. c. 218.) None of these acts give treble damages; they merely authorize a suit in the name of the supervisors, and direct the damages to be applied to the use of schools, and the support of the gospel.

\*The only act which gives treble damages is that passed *April* 9, 1805, (sess. 28. c. 94,) which is general. Where the trespass is on land belonging to private persons, the suits to recover treble damages must be brought by the owner or owners, their agents or attorneys; if it be on the land or commons of any city or town, the suit must be by the trustees of the corporation; but if on land belonging to the people of the state, the suit must be brought by the overseers of the poor of the town in which the trespass was committed, for the use of the poor.

[ \*344 ]

If the supervisors, then, can maintain the action, the land in question is not that, for which, if trespasses are committed, treble damages are given. If the land belongs to the people of this state, the suit ought to have been in the name of the overseers of the poor of the town.

*Russell* observed that whether the plaintiff is to recover treble damages or not, depends on circumstances; and is a question for the court to decide. The jury are not to find treble damages.

In *England*, in an action of assault and battery, the court, if it be a case of *mayhem*, increase the damages on view or on affidavit, after verdict; and if the cause is tried before a judge of the K. B. or the same court, he may increase the damages, and the fact need not be endorsed on the *postea*. (Ld. *Raym.* 176. 3 *Salk.* 115.) So in regard to the case of *costs*, which is analogous, the court double or treble the costs, where the party is entitled to double or treble damages; and the costs *de incremento* are doubled or trebled, as well as

ALBANY,  
August, 1811.  
Newcom  
v.  
Butterfield.

those found by a jury. (*Hullock on Costs*, 240, 241. *Sel-lon's Pr.* 548. *Com. Dig. Costs.* (C. 4.) *Cro. Eliz.* 480. 582. *Yelv.* 176. *Str.* 1048. 2 *Saund.* 250.) According to the *English* practice, therefore, the jury are not to treble the damages; but it is to be done by the judge at the trial, or by the court, on affidavit or view, and there is no necessity of an entry on the *postea*.

[ \* 345 ]

*Per Curiam.* There is an insuperable objection in these \*cases, to the plaintiff's claim to the treble damages. The present actions were brought in pursuance of the act of the seventeenth *February*, 1810, (*sess. 33. c. 5.*) which authorizes the supervisors and assessors of the towns in *Clinton* county, to sue in the name of the supervisor for trespasses committed within their respective towns, upon lots set apart for the support of the gospel and schools; and the damages, when recovered, are to be applied to the use of schools and for the support of the gospel. (*Laws*, vol. 2, p. 225, and act, *sess. 31. c. 218.*) The act giving the treble damages, directs that the suits for trespasses upon lands belonging to the people of this state (and the gospel and school lots are such lands, for they have never been sold by the state) shall be brought by the overseers of the poor of the town in which such trespasses shall be committed, for the use of the poor thereof. The present suits are not brought by the overseers of the poor, and the damages recovered are not to go to the support of the poor, but to a different object. There is no conformity to the statute, either in the party who sues, or in the destination of the fund. The case is, therefore, not within the statute giving treble damages, for that being a penal act, is to be taken strictly, and not to be extended by equity. This is the rule even as to statutes giving costs; (*3 Burr.* 1287. *Hullock's Law of Costs*, 623;) and it applies with much more force to cases in which the actual damages are to be trebled.

But though the plaintiff is not entitled in these cases to have the damages trebled, it may not be an unfit occasion to suggest the mode in which the damages under the statute are to be ascertained and trebled. It is no doubt competent for the court to treble the damages, in cases in which they are not trebled by the jury, but the jury must find the facts by which it is to be determined whether the defendant be liable to such damages. The act provides, that if, "upon the trial," it shall appear, by evidence, that the defendant was guilty through mistake, \*or had probable presumption to believe that the land on which the timber was cut was his own, the court shall give judgment for single damages only. The measure of damages, in cases coming within the act, is treble the value

of the timber cut and carried away, and the facts on which the court are to treble this value ought to appear upon the *postea*. The declaration should refer to the act, so that the defendant may be apprized of the extent of the demand ; and unless the defendant upon the trial shall bring himself within the proviso, the jury find him guilty of the trespass alleged, and assess *the single value of the timber*, and upon the return of the *postea* with this finding, the value is to be trebled by the court.

ALBANY,  
August, 1811

BACKUS  
v.  
ROGERS

Motion denied.

BACKUS and WHITING against ROGERS, Gent. one of the Attorneys, &c.

SHERWOOD, for the defendant, moved to set aside the proceedings in this cause for irregularity. The defendant is one of the attorneys of this court, and the bill was served on his agent only.

*H. Bleecker*, contra.

*Per Curiam.* When a bill is to be served on an attorney as a defendant, it is in the nature of process, and must be served on him personally, or by some other service, which the court may, under the circumstances of the case, regard as equivalent to a personal service. The motion must, therefore, be granted.

In a suit against an attorney of this court, the bill is in the nature of process, and must be served on him personally, or by some other service which the court, under circumstances, may consider equivalent. Service on the agent of the attorney is not sufficient. (a)

Motion granted.

(a) *Bridgport Bank v. Sherwood*, 16 Johns. Rep. 43. *Lawrence v. Warner*, 1. Cowen, 96. *Brown v. Childs*, 17 Johns. Rep. 1. And see *Chenango Bank v. Root*, 4 Cowen, 126. *Sperry v. Willard*, 1 Wendell, 32. *Hitchcock v. Barlow*, 3 Wendell, 629.

ALBANY,  
August, 1811.

ADAMS

VS

DYER

\*ADAMS against DYER.

CONKLIN and others against DYER.

Where two judgments in favor of different plaintiffs against the same defendant, were filed and docketed on the same day, and one of them took out a *fi. fa.* and had the lands of the defendant seized and advertised for sale, by the sheriff, three weeks before the execution on the other judgment was delivered, and the sheriff afterwards sold the land under the advertisement; it was held, that the first *fi. fa.* having been begun to be executed, before the second was delivered to the sheriff, had gained a priority as to the time of sale, which could not be defeated by the second execution.

Whether the court will inquire into the parts of a day, or receive affidavits of the exact time of filing different

[ \* 348 ] judgments on the same day, so as to determine the priority of the *lien?*

Whether the clerks ought not to mark the exact time or hour of filing judgments? *Quare.*

(a) Vide *Waterman v. Haskin*, 11 Johns. Rep. 298. *Lemon v. Heirs of Staats*, 1 Cowen, 322. And see also *Small v. M'Chesney*, 3 Cowen, 19.

or judgment, *the time* of filing the same. No other evidence but the marking of the clerk can be received, to ascertain the time of filing the judgment roll. The law allows of no fractions of a day. (*Gilb. on Ex.* 15.) There are exceptions to this rule; but they have been allowed merely to repel a fiction of law that might be injurious to the party. (*Burr.* 1241. 1434. 950.) But these cases do not apply to the present case, where third persons or purchasers may be affected. The plaintiffs in the two suits must be considered as standing on the same footing on the day on which the judgments were filed; and the maxim that *potior est conditio defendantis* may apply; and, as was observed by the Court of Appeal, in *South-Carolina*, (2 *Bay's Rep.* 9,) in the case of *Callahan v. Hallowell*, the vigilant creditor is to be preferred. Here *Adams* must be considered as the *vigilant* creditor, as he first took out execution, and had the lands sold.

*Harris*, contra, in behalf of the plaintiffs in the second cause, observed, that by the act concerning mortgages, (*sess.* 24. c. 156. [1 *R. S.* 760. sec. 25]) the clerks of the counties are required to mark the *time* of registering the mortgage, and it is the practice of the clerks of the counties to note the exact *time* or *hour* of registry. As the clerks of the courts are also required to mark the *time* of *filings* the judgments, the same rule ought to be applied, and the exact time or *hour* of filing ought to be marked, and may be shown.

In *Smallcomb v. Buckingham*, (1 *Salk.* 320. *Carthew*, 419,) two writs of *fi. fa.* were delivered to the sheriff on the same day, who executed the last first, and though the execution was held good, yet the sheriff was held liable to the plaintiff in the first execution. If the sheriff is liable, in such a case, after he has paid the money over on the second execution, surely the court would, in a case where the money was not paid *over*, order the sheriff to pay it to the plaintiff in the first execution. Lord *Holt*, in that case, said, that where two writs of *fieri facias* come to the sheriff on the same day, he must serve that writ first which came first, and in that case there is a *prius* and a *posteriorius* in the same day. If the *time* may be inquired into, in regard to executions against goods, there is a stronger reason for allowing the inquiry as to executions and *liens* against real property. Though the law does not, in general, allow the fraction of a day, yet it admits it in cases where it is necessary to distinguish. (*Combe v. Pitt.* *Burr.* 1423. 1434. 2 *Wils.* 274.) It is a *fiction* of law which regards a term as one day, yet this fiction is disregarded, and made to yield to the fact, in order to do justice between parties. The court in *S. C. in Callahan v. Hallowell*, which has been cited, recognised the same general prin-

ALBANY,  
August, 1811.

ADAMS  
v.  
DYER.

[\*349]

ALBANY,  
August, 1811.

ADAMS  
v.  
DYER.

ciple, that in all cases where it is necessary to distinguish who, of several persons, has a priority of right, the law allows of fractions of a day. Time is in its nature divisible, as well into hours and minutes, as into years and days.

The act says, that the land shall be bound from the *time* of filing and docketing the judgment; and the moment the judgment is filed and docketed, the *lien* is created, and cannot be removed without the consent of the plaintiff. The time of issuing the execution is immaterial. The execution first delivered to the sheriff has the preference, because the goods of the party are bound by the delivery of the writ. (1 *Term Rep.* 729.) But a judgment being a *lien* on lands, cannot be affected by the issuing of the execution or the delivery of it to the sheriff.

*Hamilton*, in reply, observed, that if the clerks of the court do not mark the hour or exact *time* of filing the judgment record, they do not do their duty; for the act requires them to mark the *time*. But there can be no proof of the time of filing but the *record* of the clerk or sworn officer. The court, then, have no means of deciding on the priority of the *lien*.

[ \* 350 ]

\**Per Curiam.* The judgments in these cases were signed and filed on the same day, and even if the court were at liberty (of which they very much doubt, when they compare and consider the several provisions in our laws on the subject) to inquire into the fractional parts of the day, in order to see which record was first filed, the affidavits exhibited leave the point doubtful, as to the precise time of the day in which the rolls were filed, or which was, in fact, prior in time. We must then consider the judgments equal, as to the date of the *lien*, and the next question is, whether any priority hath been subsequently acquired. If one creditor first sells the lands under his judgment, he gains a preference, and is entitled to have his judgment first satisfied out of the proceeds of the sale. It would be analogous to the case mentioned in the books, of several judgments of the same term, in which one of the judgment creditors first extends the lands, and is thereby entitled to be first satisfied. (*Gilbert on Executions*, 55. *The Attorney-General v. Andreu, Hardres*, 23.) And has not the plaintiff, who first sued out his execution, actually gained that preference? His execution was some weeks prior, and under it the lands were regularly advertised according to law, and sold in pursuance of such advertisement. The last execution was not issued and delivered to the sheriff, until about three weeks before the sale, and the sale was not made under that execution. The statute forbids lands to be sold by

virtue of any execution without six weeks' notice, and the case states that the lands were sold, and the moneys paid under the first execution. Perhaps, the mere act of delivery of the execution to the sheriff, did not gain a preference *as to the lands*, but by the act of the sheriffs in making advertisement of the lands for sale, the first execution was begun to be executed. Here was an act by which priority, in some respects, was gained. There was priority as to the time of sale, and that priority could not be defeated by the second execution.

\*The first execution is, therefore, under the circumstances of this case, entitled to preference, and must be first satisfied

ALBANY,  
August, 1811  
In the matter of  
WILLIAM  
LIVINGSTON.

[ \* 351 ]

### In the matter of WILLIAM LIVINGSTON.

CRARY moved for a rule against the judges and assistant justices of the Court of Common Pleas of the county of *Washington*, to show cause why a *mandamus* should not issue directing them to proceed in the above cause.

It appeared that the defendant is one of the judges of the Court of Common Pleas of *Washington* county, and was arrested on a *capias ad respondendum*, at the suit of *M'Geoch*, on the first day of the last *March* term of the court, when he was informed by the sheriff that his attendance was necessary in court.

A motion was made in the court below to quash the writ for irregularity, which motion was grounded on an affidavit of *Livingston*, that he was one of the judges, &c. and a claim of privilege to be free from arrest; and the court below set aside the *capias* and all subsequent proceedings, for irregularity.

A judge is not liable to arrest by process issuing out of his own court, but must be proceeded against by *bill*. Whether after bail is put in, the arrest and proceedings may be set aside on motion for irregularity, must depend on the practice of the court. This court will not interfere with the proceedings of an inferior court in this respect.

*Crary* contended that the privilege of the defendant ought to have been pleaded in abatement. A person privileged is discharged on motion only, when arrested in *facie curiae*. He must plead his privilege at a proper time and in a proper manner. If he puts in bail, it is a waiver of privilege. (a) He cited 2 *Black. Rep.* 1085. *Comyns' Dig.* tit. *Privilege*. 2 *Mod.* 182.

*Skinner*, contra, cited 3 *Lev.* 343. 2 *Wils.* 228.

(a) A party entitled to be sued by *bill* may waive his privilege by express agreement. *Leal v. Wigram*, 12 *Johns. Rep.* 83. But not if he is an attorney, (and a judge is in *pari ratione*), for it is the privilege of the court and the suitors. *Scott v. Van Alstyne*, 9 *Johns. Rep.* 216.

AL DANY,  
August, 1811.  
PUGSLEY  
v.  
VAN ALEN.  
[\*352]

*Per Curiam.* A judge is not liable to arrest, by process issuing out of his own court. He is to be proceeded against by bill. In this case the defendant put in bail, and then moved to be discharged, and the court below set aside the whole proceeding as irregular. In some \*cases the party privileged is discharged altogether from the arrest, as being deemed irregular. (Str. 985.) In other cases, the party is relieved from the arrest on filing common bail. This will depend upon the rules and practice of the court. There is nothing in this case that calls for our interference.

Motion denied.

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PUGSLEY *against* VAN ALEN.

Where a rule to set aside a default and subsequent proceedings was granted *on payment of costs*, and the costs were regularly demanded of the defendant but not paid, & the plaintiff, afterwards, issued an execution on the judgment, the court refused to set aside the execution.

The costs were taxed, and regularly demanded of the defendant on the twenty-fourth of June last, and not being paid, the plaintiff, more than a month after the demand, issued an execution on the judgment he had obtained, prior to May term, by default.

*Van Buren* now moved to set aside the execution as irregular.

*Vanderpoel*, contra, cited 1 *Johns. Cas.* 396. 2 *Johns. Cas.* 114.

Where a rule is granted on payment of costs, it is conditional, and is of no force, unless the costs be paid *instante*; and the party who is to pay costs, must seek and tender them to the other party. (a)

*Per Curiam.* The rule was conditional, and of no force, without the payment of costs. This is the import of the rule as entered, it being granted "on payment of costs." The plaintiff must have been regular, and the defendant admitted to plead at the last term as a favor, or the condition of paying costs would not have been imposed. This being the case, it would not be reasonable that the favor should be obtained absolutely, and the plaintiff driven to the tedious process of recovering the costs by attachment. It may be doubted whether the rule would admit of the construction that the party is in contempt for not paying the costs, as he was not ordered to pay them, but only admitted to a favor on that

(a) Vide 2 Cowen, 599, note (b). *Southerland v. Sheffield*, 2 Wendell, 293

condition, \*and it was left to his volition whether or not he would comply with that condition. If a new trial be granted on payment of costs, this rule, say the books, is conditional, and they must be forthwith paid. (*Impey's K. B.* 252.) So, when leave is given to a party to amend, it is on the like condition. (2 *Cromp.* 458.) We have an analogous case in this court. In *Jackson, ex dem. Onderdonk, v. Weston, May* term, 1803, the court, according to an original note of the case, said that "where a plaintiff is nonsuited, and comes for a favor, to set it aside, and it is set aside, *on payment of costs*, those costs must be paid *instanter*, and the party who is to pay must go and seek the other party."

Motion denied.

ALBANY,  
August, 1811.  
FRARY  
v.  
DAKIN

### FRARY against DAKIN.

RODMAN, for the defendant in error, moved that the plaintiff's attorney pay the costs on error, in the above cause, amounting to 164 dollars and 94 cents. He read an affidavit, stating, that a judgment had been obtained in the Mayor's Court of *Hudson*, in favor of *Dakin*, against *Fraxy*, for 341 dollars and 81 cents; and that before the judgment was rendered, the defendant below removed out of the state, into *Canada*, where he has since resided, and that the plaintiff's attorney afterwards brought the writ of error to this court, without the knowledge of the plaintiff, and the judgment below was affirmed by this court, and the plaintiff's attorney refuses to pay the costs in error.

*E. Williams*, contra, read an affidavit, stating that since the affirmance of the judgment, a suit had been brought against the special bail in the court below, and a judgment recovered for the amount of the original judgment, \*with interest and costs in the suit below, which had been paid. That the writ of error was brought with the full knowledge and consent of the plaintiff, who resided in *Hudson*, when the suit was first commenced.

*Per Curiam.* This is not a case coming within the spirit of the 14th rule of *January* term, 1799. That rule contemplates a suit originating in this court. The plaintiff in error came to this court, not to enforce a demand, but to

meaning of the 14th rule of *January* term, 1799, as to filing security for costs. [Vide 2 R. S. 620, s. 7.]

Where a writ of error is brought to this court, on a judgment obtained in a court of Common Pleas; and the judgment below is affirmed; the attorney of the plaintiff in error is not bound to pay the costs in error, on the ground that before the judgment was obtained in the court below, the plaintiff had removed out of the state, and

[ \* 354 ]

his attorney had not filed any security for the costs. The bringing a writ of error is not the commencement of such a suit as would render the attorney responsible for the costs; nor does the case come within the

ALBANY,  
August, 1811.

Ross  
v.  
Lown.

avoid a judgment which he supposed had been erroneously given in the court below. Although the bringing a writ of error is considered as a new action, yet it is not the commencement of such a suit as comes within the rule by which the attorney can be made responsible for the costs. It never has been supposed that in a case like this, a non-resident plaintiff was obliged to file a bond; and it is only when a bond ought to have been filed, that the attorney is answerable for the costs. If there had been an application to the court to stay the proceedings on the writ of error, it is probable the proceedings would have been stayed, until security for costs had been given..

The motion is denied.

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Ross against Lown.

In an action of *trespass de bonis aportutis* the venue had been changed, on the usual affidavit of the defendant; from *Onondaga* county to *Saratoga*, where the trespass was committed; and

[\*355] the plaintiff afterwards applied to bring back the venue to the county of *Onondaga*, on the ground that he had two or more material witnesses residing in that county; but the court refused to grant the motion, unless the plaintiff would stipulate to give

The plaintiff now moved to bring back the venue, and his affidavit stated that there were two or more witnesses, \*who will be material for him, residing in the county of *Onondaga*. His attorney stated that the notice to change the venue, for *May* term, came to his hands on *Saturday* before the commencement of *May* term, having been served on his agent at *Albany*, about eight days before; that he, on the *Monday* after he received the notice, procured the plaintiff's affidavit on which to resist the motion, and sent it to his agent in *New-York*, who did not receive it till some time in the second week. The rule for changing the venue had been then entered, so that the agent was prevented from opposing the motion. The affidavit then sent was substantially like the material evidence arising in the county of *Onondaga*. (a)

(a) *Acc. Duryee v. Orcott*, 9 *Janes. Rep.* 248. *Serially v. Wells*, 1 *Cowen*, 196. And the affidavit should state that *each and every* of the witnesses are material, and that without *each and every* of them, the party cannot safely proceed to trial. *Anon.* 7 *Cowen*, 102. *Anon.* 3 *Wendell*, 425. That witnesses reside in an adjoining state, near the county in which the venue is laid, is not a sufficient reason for retaining it. *Canfield v. Lindley*, 4 *Cowen*, 532. *Peet v. Billings*, 2 *Wendell*, 282. *Bank of St. Albans v. Knickerbocker*, 6 *Wendell*, 541. It seems, the plaintiff may retain his venue by stipulating to pay the expenses of the defendant's witnesses. *Harriner v. Bette*, 2 *Cowen*, 496. *Contra, Rathbone v. Harman*, 4 *Wendell*, 208.

one now made, and on which the present motion was founded.

ALBANY,  
August, 1811.

Ross  
v.  
Low

*Per Curiam.* In *Manning v. Downing*, (2 *Johns. Rep.* 453,) the rule on the subject of changing the *venue* was laid down, and the court said, that they had an equitable power over *venues*, and would exercise it, so as to promote the convenience of suitors and save expense to the parties; and that in actions arising on contracts, they would not permit the plaintiff, by a stipulation, to retain the *venue*, when the defendant would satisfy the court that he had witnesses material to his defence in a distant county; and, accordingly, in that case, the defendant having sworn that he had several witnesses residing in *Columbia*, material to his defence, the court required the plaintiff, in order to retain the *venue*, to satisfy them by affidavit, that he had material witnesses in *New-York*.

The present case is in trespass *de bonis asportatis*, and we have not, as yet, extended the rule laid down in *Manning v. Downing*, to such a case. By the practice of the king's bench, on the present affidavit, the defendant would be entitled to change the *venue*, unless the plaintiff stipulated to give material evidence, arising in *Onondaga*; and without such stipulation, the *venue* ought to be retained where it now is, in *Saratoga*. The place where the goods were taken, must, in all probability, be the place where the witnesses reside, and in that county the trial ought to be; not on the exploded notion for the purpose of having the cause tried by a jury of the vicinage, but because the convenience of the parties will be promoted by it, and there will be a saving of expense, in regard to witnesses.

Unless, therefore, the plaintiff will stipulate to give material evidence arising in *Onondaga*, the motion to carry back the *venue* to that county must be denied.

[ \*356: ]

ALBANY,  
August, 1811.

AUSTIN  
V.  
BEMISS.

AUSTIN *against* BEMISS, jun. and FOLLET.

SAME *against* BEMISS.

Where separate suits are brought against the *maker* and *endorser* of a note, and separate judgments recovered, the plaintiff is entitled to the *costs* in each suit. The statute (*sess. 24, c. 90, s. 14.*) does not apply to this case.

AT the last *February* term, the plaintiff, *Austin*, sued *David Bemiss, jun.* and *Otis Follet*, and *David Bemiss*, in two separate actions, on a promissory note, dated 11th *November*, 1808; the former as *makers*, and the latter as *endorser* of the same note. The proceedings in each suit were separate, and judgments taken in each, separately, by *cognovit actionem*. The question presented on these facts was, whether the plaintiff could recover costs in both suits, or in one only.

*Per Curiam.* The plaintiff is entitled to the costs of each suit. (1 *Str.* 515.) The statute (2 *R. S.* b. 15, sec. 15,) allowing a recovery of costs in one suit only, when several suits are brought upon the same instrument, does not apply to this case, but to cases in which separate suits are brought upon the same note or bond, when one suit would have served. Here the suits against the *maker* and *endorser* were necessarily distinct, and could not have been consolidated, for they were distinct contracts. The observation in 1 *Johns. Rep.* 293, (a) intimating that costs in both suits were not recoverable in a case like this, must have arisen from some inadvertence, for no such idea was ever entertained by any member of the court.

[ \* 357 ]

(a) LIVINGSTON *against* BISHOP.

In *Gilmore v. Carr*, in the Supreme Court of *Massachusetts*, (2 *Mass. Rep.* 171,) it was decided, that where the endorsee had recovered judgment and satisfaction of the endorser of a note, he could not have his costs in a suit previously commenced against the *maker*. In *Tarin v. Morris*, (2 *Dallas*, 115,) in the Supreme Court of *Pennsylvania*, it was decided, that though but one satisfaction can be recovered, yet that execution may issue in all the actions against the several parties to a promissory note; and where a judgment had been obtained for the debt and costs against the drawer, the court allowed judgment to be entered against the endorser, in the suit against him, for the costs. (a)

(a) And in *Meech v. Churchill*, (2 *Wendell*, 630,) the Supreme Court decided in conformity with the case in the text, that a plaintiff who sues the *maker* and *guarantee* of a note, is entitled to full costs in each suit. But see the act 9th *April*, 1832.

ALBANY,  
August, 1811.CAINES  
v.  
HUNT

## PORTER against LANE.

THIS was an action of trespass *quare clausum fregit, et de bonis asportatis*. There was a verdict for the plaintiff for 45 dollars.

A motion was now made, in behalf of the defendant, that the costs taxed in his favor, be set off against the damages recovered by the plaintiff, the damages being under 50 dollars. The plaintiff was reputed to be insolvent.

*Per Curiam.* The case of *Spence v. White*, (1 Johns. Cas. 102,) is in point, and in favor of the motion. The plaintiff's attorney has a lien for his costs only on the net balance due, after the defendant's charges in that suit are deducted. The attorney acts upon the credit of his client, and his lien cannot interfere with the equitable arrangement between the parties. It is subject to the equitable claims of the parties. This is the principle sanctioned by the cases in 2 Bos. & Pull. 28. and 4 Bos. & Pull. 22, and which is the rule adopted by this court.

Motion granted.

equitable right of *set-off* between the parties. (a)

(a) *Vide supra* 123, *Willet v. Starr, Jackson v. Randall*, 11 Johns. Rep. 405. *Ross v. Dole*, 13 Johns. Rep. 306. *Abernathy v. Abernathy*, 2 Cowen, 413.

## \*CAINES against HUNT.

[\* 358]

POWER'S, in behalf of the defendant, moved to set aside the proceedings on the bail-bond in this cause. The writ in the original cause was returnable last November term. On the 12th December, special bail in the cause was filed in the clerk's office, and a notice thereof, with a notice of retainer by the defendant's attorney, served the same day, on the agent of the plaintiff. The defendant's affidavit stated also, that he had a good and substantial defence on the merits.

It appeared that the bail-piece contained the name of one real and substantial person, and *John Doe*.

The plaintiff regarding the bail-piece as a *nullity*, com-

to except to the sufficiency of the bail. (a)

(a) But if the debt sworn to be large, each of the bail will not be compelled to justify in double the amount; as where the bail demanded was \$45,000, the court held a justification, amounting, in the aggregate, to that sum, by two or more persons, to be sufficient. *Cromelines v. Beldens*, 1 *Wendell*, 107.

ALBANY.  
August, 1811.

CAINES  
v.  
HUNT.

menced the suit on the bail-bond, and on the 25th May last, entered a default, for want of a plea.

*Caines*, contra. In *Wendover v. Ball*, (*Coleman's Cas.* 42,) there was a similar bail-piece, being one real and one nominal person, and a justification by the real person, and the court said it was *no bail*, and would have granted a rule against the sheriff, if he had not stipulated to put in additional bail. The practice of putting in such bail, the court said, had obtained, merely because no one had opposed it. There was no exception in that case, and the bail was treated as a *nullity*.

In *England*, one bail is considered as no bail, and if treated by the plaintiff as a nullity, the court will refuse to stay proceedings against the sheriff on the bail-bond. (*Pract. Regis.* 84, 85. *Impey's C. P.* 214. 2 *Bos. & Pull.* 49. 1 *Bos. & Pull.* 856. But see 2 *East.* 181, and *Doug.* 466, n. as to practice in K. B.) And such, according to the decision in *Wendover v. Ball*, is the rule of this court. Though a different practice may have prevailed, yet, being erroneous, it cannot be sanctioned by time, merely because it has passed without opposition.

Here the plaintiff, by suing the bail-bond, made his *election* to treat the bail-piece as a nullity.

[ \* 359 ]

\*A bail-piece is an entire thing, it cannot be good in part and bad in part; and if a nullity, it may be wholly disregarded, and the plaintiff may proceed as if nothing had been done.

*Powers*, in reply, said that in *Ferris v. Phelps*, (1 *Johns. Cas.* 249.) the court set aside the judgment on the bail-bond, because the plaintiff had neglected to except to the special bail. If the bail are insufficient, the proper course is to except to them. (2 *Tidd's Pract. K. B.* 223. 228, 229.)

*Per Curiam.* This case is different from those cited by the plaintiff, from the *English* books, which were proceedings against the sheriff. Where insufficient or improper bail are put in, the regular course is for the plaintiff to except to them. He cannot treat the bail-piece as a nullity, and proceed on the bail-bond. The proceedings in this case on the bail-bond were, therefore, irregular.

Rule granted

ALBANY,  
August, 1811.CHAPMAN  
v.  
RAYMOND.LANE, Assignee, &c. *against* COOK and another.

LYNCH, for the defendant, moved to set aside the proceedings in this suit on the bail-bond. The writ in the original suit was returnable the first day of the last term; and special bail was filed, and notice thereof given, to the plaintiff's attorney, on the 3d *June*, being within twenty days after the last day of term.

A defendant has 20 days after the last day of the second week of the term within which to put in special bail

*Gold*, contra.

*Per Curiam.* According to the settled practice, the defendant has twenty days from *Saturday* in the second week of the term, within which to put in special bail; and until the expiration of that time the bail-bond cannot be put in suit. If the plaintiff chooses to file common bail, it may be done after forty days from the second week of term.

Motion denied

\*CHAPMAN *against* RAYMOND.

[\*360]

NOTICE of a motion to be made at this term, was served in the vacation, on the agent of the plaintiff's attorney in *Utica*.

Service of a notice in vacation of a motion to be made in term, on the agent of the attorney in *Utica*, is sufficient  
(a)

*E. Williams* objected that the service ought to have been on the agent of the attorney in *Albany*.

*Parker*, for the motion.*Per Curiam.* The notice is sufficient.(a) *Acc. Caines v. Gardner*, 11 *Julus. Rep.* 89.

ALBANY,  
August, 1811.

VERNEY  
v.  
BENEDICT.

COOPER and others *against* CARR.

Service of a notice on an attorney or his clerk, in his office at 10 o'clock in the evening, is good. (a)

N. WILLIAMS, for the defendant, moved to set aside the default entered in this cause.

Sherwood, contra, objected to the sufficiency of the notice of motion, it having been served at ten o'clock at night.

*Per Curiam.* It appears from the affidavit, that the notice was served on the clerk of the plaintiff's attorney, in the office, which was open, and that is sufficient.

(a) *Vide Othiel v. De Graw*, 6 Cosen, 63. *Coming v. Pray*, 2 Wendell, 696.

=====

VERNEY *against* BENEDICT.

Where no attorney is employed by the defendant in error, on a *certiorari*, the assignment of errors, which is general, need not be served on the party. Service of a notice to join in error, is sufficient.

H. Bleecker, for the defendant in error.

Sudam, contra.

(a) *Vide supra* 287, *Clement v. Cressman*.

END OF AUGUST TERM.

## CASES

ARGUED AND DETERMINED

IN THE

## Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN OCTOBER\* TERM, 1811, IN THE THIRTY-SIXTH YEAR OF OUR  
INDEPENDENCE.

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### JACKSON, *ex dem. M'CREA, against BARTLETT.*

THIS was an action of ejectment. The cause was tried at the *Essex* circuit, in *June*, 1810, before Mr. Justice *Van Ness*.

The plaintiff gave in evidence a record of a judgment, in the Court of Common Pleas of *Essex* county, in favor of *Israel Bedell*, against *Nathaniel Mallory*, docketed the tenth *September*, 1801; and a writ of *fieri facias*, issued on \*the judgment, tested the sixth *January*, 1807, which recited that a writ of *capias ad satisficiendum* had before been issued on the same judgment, on which *Mallory* was taken, but escaped from custody. There was a regular return endorsed by the

In an action of ejectment against a purchaser of land under a sheriff's sale, the regularity of the ex-

[ \*362 ]

ecution cannot be questioned.

(a) If an execution issue after a year and a day, without a revival of the judgment by a

*scire facias*, it

\* By an act of the last session of the legislature, the terms heretofore held in *November* and *February*, were directed to be held on the third Monday of *October* and the first Monday of *January*, in each year.

is only voidable at the instance of the party against whom it issued. (b)

After an *escape* by the defendant from custody on a *ca. sa.* the plaintiff may proceed against the sheriff for the escape, and at the same time, take out a *fieri facias* against the property of the defendant, for the remedies are not inconsistent with each other.

A purchaser at a sheriff's sale cannot be affected by any matter subsequent to the sale, arising between the parties to the judgment to which he is a stranger.

The plaintiff's attorney, from his general character as attorney, has no authority to discharge the defendant from execution on a *ca. sa.*, until the money is paid. His general authority ceases with the judgment, or at least with the issuing of an execution within the year. (c)

(a) *Acc. Jackson v. Delancy*, 13 *Johns. R.* 537. *Jackson v. Robins*, 16 *Johns. Rep.* 537.

(b) *Woodcock v. Bennett*, 1 *Cowen*, 711. *Ontario Bank v. Hallet*, 8 *Cowen*, 192.

(c) *Acc. Kellogg v. Gilbert*, 10 *Johns. Rep.* 220. And see *Gorham v. Gale*, 7 *Cowen*, 789

NEW-YORK, sheriff on the *fi. fa.* stating that he had sold at auction the October, 1811. premises in question, with other lands of *Mallory*, to the lessor of the plaintiff, as the highest bidder. It was objected to the *fi. fa.* that it had issued above a year after the judgment; but the objection was overruled. The escape of *Mallory* from the custody of the sheriff on the *ca. sa.* was proved, and that the defendant had confessed that he held under *Mallory*. The deed of the sheriff to the lessor, dated 1st *August*, 1807, was also produced.

JACKSON  
v.  
BARTLETT.

The defendant gave in evidence a record of a judgment, docketed the 2d *September*, 1806, in the Supreme Court, in favor of *Bedell* against the sheriff of *Essex*, in an action on the case, for the escape of *Mallory*, in which the plaintiff recovered the whole debt and costs. It was also proved that a *scire facias*, tested the 16th *August*, 1806, was issued on that judgment, which was returned satisfied, by a judgment bond dated 4th *July*, 1808, taken by consent of *Bedell's* attorney.

The defendant offered to prove that the attorney of *Bedell* had consented to *Mallory's* discharge from the *ca. sa.*; which was objected to, and the testimony overruled.

It was then proved by the plaintiff, that the last *fieri facias* was sued out, at the instance of the sheriff, and solely for his benefit.

A verdict was taken for the plaintiff, subject to the opinion of the court.

*Z. R. Shepherd*, for the plaintiff. 1. The regularity of the issuing the *fieri facias* could not be inquired into at the trial of this cause. The execution was good, until avoided by the party against whom it had issued.

[ \* 363 ]

\*2. Does the recovery against the sheriff for the *escape*, destroy the right of proceeding on the judgment against *Mallory*? There is no connexion between the escape and the judgment; nor can the judgment be affected by the escape. The case is analogous to a proceeding against two joint obligors, where one is taken in execution and escapes, yet the plaintiff, notwithstanding his remedy against the sheriff, may proceed to judgment against the other obligor. (*1 Roll. Abr.* 196. *Cro. Car.* 75. *Cro. Eliz.* 478. 555. *Moore*, 459.) One judgment does not extinguish another judgment. A plaintiff may pursue different remedies, though he can have but one satisfaction.

Again, the sheriff having a legal right to sell under the *fi. fa.* the title vested in the purchaser, and cannot be divested by the subsequent act of a *third* person.

3. After the *record* of the judgment against the sheriff was produced in evidence by the defendant, to prove the *escape*,

He could not give evidence of any confessions or admissions of the plaintiff contrary to that fact.

4. But granting the evidence offered to be admissible, it could avail nothing; for an attorney has no authority, without the consent of the plaintiff, to discharge a debtor from custody. (*1 Roll. Rep.* 365. *1 Roll. Abr.* 585. *1 Salk.* 89. *6 Johns. Rep.* 51.) An attorney cannot enter a *retraxit*, without his client's consent, for it is against the duty of an attorney to release or destroy the rights of his client. (*2 Inst.* 378.) He may act for the benefit, but not to the prejudice of his client, without express authority; for he will be presumed to have power to do what is for his client's benefit, but not when he acts against the interest of his client.

NEW-YORK,  
October, 1811

JACKSON  
v.  
BARTLETT.

*Skinner* and *E. Williams*, contra. 1. The defendant does not claim under the sheriff, nor is he party to the judgment against him for the escape. He is not, therefore, estopped by that judgment, from showing that there was a discharge from the *ca. sa.* or from contradicting the fact of an escape. If the defendant on that execution, \*was legally discharged by the attorney, it cannot be denied that the execution was satisfied at law, though there might have been no real satisfaction of the debt. Then, had the attorney for the plaintiff authority to discharge the defendant *Mallory* from that execution? Since the decision in the case of *Noyes v. Denton and others*, (*6 Johns. Rep.* 296,) there can be no doubt of his authority; for if an attorney, without warrant, may confess a judgment to bind the defendants, surely an attorney on record, who has been regularly employed by the plaintiff in the suit, has power to release or discharge the defendant on the judgment. The sheriff is bound to obey the directions of the plaintiff's attorney. The discharge of the debtor, or the recovery for the escape, is equivalent to a satisfaction. For aught that appears, a real satisfaction may have been made to the attorney, to induce him to discharge the prisoner. It is fair to presume that the attorney was satisfied, before he consented to the discharge. In judgment of law, if not in fact, there was a satisfaction of the judgment. The law presumes a satisfaction, if an execution is not returned. The execution issued in 1806, and no return was made until 1808.

[ \*364 ]

Again, the *fieri facias* was satisfied by the liability of the sheriff, and the recovery against him for the previous escape on the *ca. sa.* issued on the same judgment, to the full amount. In *Rawson v. Turner*, (*4 Johns. Rep.* 469,) it was held, that where the plaintiff had elected to proceed against the sheriff for the escape, he should not hold the defendant in execution. The plaintiff had his election, either to proceed against the sheriff, or to issue a new execution, and having made that

NEW-YORK,  
October, 1811.

JACKSON  
v.  
BARTLETT.

[ \* 365 ]

election, every other remedy is discharged. If the plaintiff could not take out a new *ca. sa.* and commit the defendant, after electing to sue the sheriff on the escape; for the same reason, he cannot take out a *fieri facias* against the property of the defendant.

Again, a sheriff, on his mere liability to an action for an escape, may maintain an action against the defendant. (*Cro. Eliz.* 53.) \*For a stronger reason, he may, after a judgment and execution against him, bring his action. If so, then the defendant might be doubly liable, first to the sheriff, and also to the original plaintiff. Hence the propriety of the rule laid down in *Rawson v. Turner*, that the plaintiff shall be concluded by his election.

*Foot*, in reply, said, that a *bona fide* and innocent purchaser under a sheriff's sale, could not be prejudiced by the proceedings between the parties to the judgment. After the production of the record, to prove the escape, parol evidence was inadmissible to show that there was no escape. But admitting that the plaintiff's attorney did consent to the discharge; yet the twenty-third section of the statute (sess. 24, c. 28, 2 R. S. 364, s. 8) declares, that if a person charged in execution, "shall escape by any means or ways whatsoever," the plaintiff may retake him on a new *ca. sa.* or issue a *fieri facias*. But it is a sufficient answer to say, that an attorney cannot discharge a defendant, without payment or satisfaction of the debt.

The decision in *Rawson v. Turner* is not applicable to the present case. The court said that the plaintiff should not sue the sheriff for the escape, and, at the same time, hold the defendant in prison, by a new execution; for the two remedies were incompatible with each other. A remedy against the property of the defendant, is not incompatible with a suit against the sheriff for the escape.

*Per Curiam.* 1. The question on the regularity of the *fi. fa.* could not be raised in this case. Though the execution may have issued a year and a day after judgment, without revival by *sci. fa.* it was only voidable at the instance of the party against whom it issued. (3 *Lev.* 403. 3 *Caines*, 271. 273.) It was good in point of form, and several reasons might possibly have been assigned, if the question had come up on motion to set it aside, why the execution was duly issued, even after the year and \*a day. It was not for the present defendant to question a purchaser's title under such an execution. It was a good authority for the sale. (*Shirley v. Wright*, 1 *Salk.* 273.)

2. Nor is there any more weight in the objection that the

[ \* 366 ]

plaintiff had concluded himself, by electing to sue the sheriff for the escape, and to proceed to judgment against him. The *satisfaction* that is stated to have been obtained upon that judgment, whatever might have been its force, otherwise, is to be put out of view in this case, for it appears to have been long after the sale and purchase by the lessor of the plaintiff. His title could not be affected by matter subsequent to the sale, and between strangers with whom he had no privity. The statute gave the plaintiff in the first execution, a right to sue out any other execution after the escape; (*Laws*, vol. 1, p. 218. 2 *R. S. ut sup.*;) and his instituting a suit for the escape, did not deprive him of that right, because the suit and judgment against the sheriff was no satisfaction, nor were the two remedies inconsistent with each other. He was at liberty to pursue both the remedies, concurrently, until he had obtained satisfaction upon one. In *Rawson v. Turner*, (4 *Johns. Rep.* 469,) the election of one remedy was incompatible with the pursuit of the other, as the one remedy was upon the ground that the other had ceased. The party was not then concluded in this case, by any election, and the *fi. fa.* was duly sued out, notwithstanding the judgment against the sheriff.

3. The only remaining point is, whether the proof offered by the defendant, that the first execution was satisfied by the discharge of the prisoner, ought to have been received. The offer was to show that the attorney for *Bedell* had permitted *Mallory* to be discharged from the *ca. sa.* The defendant was not concluded from this proof, by the circumstance of his having produced the judgment against the sheriff for the escape. As he was a stranger to that judgment, and without notice of such \*a suit, he was not bound by it; but he produced the judgment for another purpose, which failed, and he then resorted to parol proof, to meet the like proof which the plaintiff had offered relative to the escape. The great and decisive objection to the evidence offered, is, that it was of no avail, because the attorney to the plaintiff in the suit had no authority, from his general character, as attorney, to discharge the defendant from execution on *ca. sa.* until the money was paid. It was a disputed point as early as the case of *Payne v. Chute*, (1 *Roll. Rep.* 365,) whether an attorney could acknowledge satisfaction without receiving the money. *Coke* and *Doddridge*, justices, differed upon that point; and there is no case in which that authority has been adjudged to belong to him, and it is against the nature and limitation of his trust. An attorney's authority determines with the judgment, or at least with the issuing of the execution within the year. (2 *Inst.* 378. 2 *Bos. & Pull.* 357.) The most that the cases say, is, that he may receive the money recovered by *ca. sa.* and

NEW-YORK,  
October, 1811

JACKSON  
v.  
BARTLETT.

[ \* 367 ]

NEW-YORK, then acknowledge satisfaction. (2 *Show.* 138. 1 *Roll. Rep.* 365.)

*Jackson*  
v.  
*Douglas.*

The Court are, therefore, of opinion, on all the points, that the plaintiff is entitled to judgment.

**JACKSON, *ex dem.* WHITMAN and another, against DOUGLAS.**

Where there was no uncertainty as to the true location of two adjoining lots of land, as originally made, near for-

[\* 368] ty years ago, the single fact that one of the lessors in ejectment, hrd, about eight years ago, shown to the defendant a mistaken line, as the true line, was not sufficient, of itself, to conclude the lessors, or to set aside a verdict for the plaintiff.

(2)

THIS was an action of ejectment for part of great lot No. 8. in *Henderson's* patent. The cause was tried at the *Herkimer* circuit, in *June*, 1811, before Mr. Justice *Van Ness*. The lessors owned 150 acres of land, on the north part of lot No. 8. and extending across the whole width of the lot, as delineated on the map of the patent, exhibited at the trial. The defendant owned the whole \*of lot No. 7. and the only question was as to the line bounding between the two lots. Several surveyors were admitted as witnesses, but it is unnecessary to detail their evidence. It appeared that the defendant possessed ten chains and ten links west of the true boundary line; which was the quantity of land in dispute. But a witness for the defendant testified, that when the possession was taken, about eight years before the trial, a division fence was run on the line to which the defendant claimed, which was shown by one of the lessors, as the true line. The marks of the trees, constituting the boundary line between the lot No. 7. and 8. were about forty or fifty years old; but in that part where the defendant had possession, the land was cleared, and no marked trees left. The jury, under the direction of the judge, found a verdict for the plaintiffs. A motion was made to set aside the verdict, which was submitted to the court, without argument.

*Per Curiam.* There is not a sufficient cause for interfering with the verdict. There was no uncertainty originally, as to the true location of the lots. It is very clear that the defendant possesses beyond the true line, between great lots No. 7. and 8. and the single fact, that one of the lessors of the plaintiff, about eight years ago, showed a mistaken line as the true line, is not, of itself, sufficient to conclude him, in this case. The motion is, therefore, denied.

Motion denied.

(a) Vide *Jackson v. McCall*, 10 *Johns. Rep.* 377.

NEW-YORK,  
October, 1811.FEETER  
v.  
WHIPPLE.\*FEETER *against* WHIPPLE, Sheriff, &c.

THIS was an action of trespass on the case, brought against the defendant, as sheriff of the county of *Madison*, for an *escape*.

At the trial of the cause, before Mr. Justice *Yates*, at the *Madison* circuit, the 30th *May*, 1811, it was proved that the defendant took one *Hadcock*, in *July*, 1809, on a *ca. sa.* at the suit of the plaintiff, for 60 dollars and 30 cents damages, and 20 dollars costs; and that the sheriff left *Hadcock* at the house where he was taken, while he, the sheriff, went a short distance, and told *Hadcock* to wait until his return; that after waiting a short time, *Hadcock* left the house and went home, where he staid all night, and the next morning, on his way to the plaintiff's, was again arrested by the sheriff, who took him to *Petersburgh*, out of the direct road to the gaol, and left him in a house, when he made his escape and returned home, and kept out of the sheriff's way, until he was again arrested on the execution in *September*, and carried to the county gaol. It appeared that the sheriff, after the second escape, made search after his prisoner, and offered and paid a reward for his recaption.

The defendant proved the insolvency of *Hadcock*, and his inability to pay any part of the debt. It was shown that, in *November*, after his imprisonment, his property, to the amount of 45 dollars, had been taken and sold on executions issued from a Justice's Court; but that there was some dispute about the property.

The judge charged the jury, that the plaintiff was entitled to recover in damages, as much as he had lost by the escape; and that they would be warranted to find a verdict for the plaintiff for 45 dollars, the amount of property sold on the executions in *November*. The jury found a verdict for the defendant.

\*A motion was made to set aside the verdict, which was submitted to the court, without argument.

[\*370]

*Per Curiam.* The verdict is against the weight of evidence. But the action sounding in *tort*, and the sum in controversy small, and the value of the prisoner's property uncertain, and the evidence on that point contradictory, it is not a case for a new trial. The motion is, therefore, denied. Motion denied.

(a) Where the testimony at the trial was contradictory, a new trial will not be granted unless there was a decided preponderance against the verdict. *Woodward v. Paine*, 15 Johns. Rep. 493. *Winchell v. Latham*, 6 Cowen, 662. *Douglas v. Tonsey*, 2 Wendell, 352. *Smith v. Hicks*, 5 Wendell, 48. *Vide ex parte Baily*, 2 Cowen, 479.

NEW-YORK,  
October, 1811.

JACKSON  
v.  
PULVER.

JACKSON, *ex dem.* BAIN and VAN SLYCK, *against* PULVER and another.

Where *A.*, a tenant in possession, by writing, under his seal, surrendered the possession and premises to the lessor in an action of ejectment, and all right, &c. to have and to hold to the lessor and his heirs and assigns for ever, *provided* such lease should be accepted by the lessor, as a full discharge for all lands, claimed of *A.* by the lessors under the ejectment, &c.

[ \* 371 ]  
It was held, that admitting the full discharge of claim mentioned in the proviso, to amount to a sufficient consideration, and that the deed contained words sufficient to pass a fee, yet it was void, and no bar to *A.*'s title, unless the lessors showed a valid discharge, which could not be by parol, or by mere implication, arising from the fact of possession of the deed (4)

THIS was an action of ejectment, for land in *Kinderhook*. The cause was tried at the last *Columbia* circuit, before Mr. Justice *Thompson*.

The plaintiff gave in evidence a deed from *Dierck Gardnier* to *Peter W. Van Buren*, dated *November* eight, 1779; a deed for the same premises from *Van Buren* to *Cornelius Van Schaack*, dated *March* twenty-nine, 1782; a deed from *Van Schaack* to *Tobias Van Slyck*, dated *July* twenty, 1784; and a deed from the latter to *Samuel and Dierck Van Slyck*, dated *August* twenty-six, 1784; and a deed from the latter to *Samuel Van Slyck* the lessor, dated *May* one, 1786. The plaintiff also proved, that the premises in question were included within the boundaries of the land set forth in the deeds; that *Pulver*, one of the defendants, and *Samuel Van Slyck*, one of the lessors, were tenants in common, and made a partition deed between them, dated *February* twenty-five, 1801, in which *Pulver* acknowledged himself a tenant in common of the premises in question, \*and released and conveyed them to the said lessor.

The defendant offered in evidence a deed or instrument, as follows :

"*SUPREME COURT: James Jackson, ex dem. Jacobus Van Deyuren and others, against John Stiles and Samuel Van Slyck, tenant.* I, *Samuel Van Slyck*, tenant in possession of the premises claimed by the lessors of the plaintiff in the action of ejectment, being two lots of land lying north of the road leading from *Kinderhook* landing to the towns of *Chatham* and *Canaan*, and west of a road leading from the said road to the *Fish Lake*, as the said lots have lately been, and now are, in my possession, do hereby *surrender* to the lessors of the plaintiff the *possession of the above described premises, and all my right and title to the same*. To have and to hold to them and to their heirs and assigns for ever. As witness my hand and seal; this twenty-third day of *November*, 1805.

(Signed)

"*Samuel Van Slyck.*" (L. s.)

"Provided nevertheless, that the above *release* is accepted by the lessors of the plaintiff, *as a full discharge of their claim on me*, for all lands claimed by them under the said

(a) A release being once regularly executed and delivered, can never afterwards be avoided at law by a failure of one of the parties to perform an act, in consideration of which the release was given. It can amount only to a breach of contract for which the party in default will be liable to the party aggrieved. *Fitzsimmons v. Ogden*, 7 *Cranch*, 19.

*ejectment*, except a small piece of land lying north-east of the house of *Moses Gillet*, about which there has lately been a controversy between the said *Moses Gillet* and me, which exception last mentioned is not to affect my right to the premises last mentioned.

(Signed) "Samuel Van Slyck." (L. s.)

NEW-YORK,  
October, 1811.

JACKSON  
v.  
PULVER

This evidence was objected to, and overruled by the judge; and a verdict was taken for the plaintiff, subject to the opinion of the court on the legal effect of the deed so offered in evidence.

*Foot* and *Van Vechten*, for the plaintiff. The lessors made out their title by deed, and the only question is, \*whether the defendants have shown any thing to maintain their right of possession. The instrument or deed offered in evidence by them, cannot be classed among any of the common law conveyances. There are no granting words in the instrument. It is nothing more than a *surrender* of the possession. *Surrender* is not a word of common law conveyance. (2 *Black. Com.* 326. 1 *Shep. Touch.* 300. 2 *Shep. Touch.* 513. 2 *Black. Com.* 338. 1 *Bac. Ab.* 463. 469. *Cru. Dig. tit.* 32. *ch.* 11. *sect.* 3. 3 *Johns. Rep.* 484. *Wilkes's Rep.* 677. *Cro. Eliz.* 394. 1 *Vent.* 137.) It is not a bargain and sale. There must be a valuable consideration to give effect to a bargain and sale, under the statute of uses. (1 *Co.* 176.) It may be said, perhaps, that the *proviso* contains a sufficient consideration. But the proviso constitutes a separate and distinct contract; and if the *surrender* or conveyance was void, it could not be made good by a subsequent contract. A proviso cannot operate as a consideration; (2 *Shep. Touch.* 210;) but, in fact, it contains no consideration to support a conveyance.

[ \* 372 ]

*Van Buren*, contra. The only question is, whether the deed offered by the defendants is sufficient to prevent the plaintiff's recovery. Courts are disposed to enforce contracts fairly made, so as to prevent, rather than promote litigation. The defendants are not entitled to favor, when they seek to avoid a possession fairly obtained by their own deed, on a mere technical objection.

1. There is no established *formula* of words, which are essential to the transfer of property, or a valid conveyance. It is enough, if it appears on the face of the deed that it was the intention of the parties to transfer the property. Deeds are to be construed, as much as possible, according to the intention of the parties, (10 *Mod.* 40, 41. 47. 3 *Atk.* 135. 1 *Massa. Rep.* 219. 3 *East.* 115. *Allen*, 41. 1 *Co. Litt.* 70. 5 *Term Rep.* 129. 310,) without regard to the precise form of words.

NEW-YORK,  
October, 1811.

JACKSON  
v.  
PULVER.

Thus the words "limit and appoint" have been held sufficient to pass a fee. In the case of *Jackson, ex dem. Hudson and Chapman, v. Alexander and others*, (3 Johns. 484,) this court held that the words "make over and grant," were operative to convey land. Yet those are not words of common law conveyance.

\*2. In the case of *Jackson, ex dem. Hudson and Chapman v. Alexander and others*, the subject of consideration in a deed was fully discussed; and it was there held that the words *value received* imported a sufficient consideration. A mere nominal consideration is sufficient to give validity to a deed. In *Stephens v. Bateman*, (1 Bro. Ch. Cas. 22,) the Court of Chancery, in *England*, refused to set aside a deed entered into for the sake of settling a controversy, merely because the consideration was insufficient. The consideration need not be set forth in the deed; it may be averred and proved by parol, at the trial.

Again, here was a release or discontinuance of all claim, which is an adequate consideration. It was, in fact, a mutual release, which implies a sufficient consideration.

In the construction of a deed, the whole instrument is to be taken together. The *habendum* will serve to explain, enlarge or abridge the *premises*. (*Cruise's Dig. tit. 32. ch. 22. sect. 43—55.*) In *Goodtitle v. Bailey*, (Coup. 897,) Lord *Mansfield* declared, "that the rules established for the construction of deeds were founded in law, reason, and common sense; that deeds shall operate according to the intention of the parties, if by law they may; and if they cannot operate in one form, they shall operate in that which, by law, will effectuate the intention." In that case, a release was construed to operate as a grant of the reversion, so as to give effect to the intention of the parties. (*Cruise's Dig. tit. 32. ch. 22. sect. 20, 21.*)

Again, if this was a deed of *surrender*, it required no consideration. It is good between the parties, though it may be void in regard to third persons. (*Co. Litt. 338. b.*) It must operate, then, as a good surrender against the lessor, who is estopped, by the deed, to say it is not a surrender.

*Per Curiam.* The single question in this case, is, as to the validity of the deed offered by the defendants. If that be of no force, the lessors of the plaintiff must recover. The deed does not contain, upon \*the face of it, any evidence of a consideration, and none was offered in proof. But as it was executed upon the condition of being accepted "as a full discharge of the claim on the grantor for lands," &c. the discharge of the claim may, perhaps, be considered as the consideration. There is, however, an insurmountable diffi-

culty in this view of the question. There was no evidence on the part of the defendants, that the grantees had discharged, or offered a discharge of such claim. No valid discharge of a valid claim to lands can be made by parol, or by mere implication arising from the fact of the possession of the deed. The deed, therefore, is of no force, as a bar to the plaintiff's title, even if it should be admitted that the granting words were sufficient to convey a fee.

NEW-YORK,  
October, 1811

HERRICK  
v.  
BENNETT

Judgment for the plaintiff.

**HERRICK against BENNETT.**

THIS was an action of *assumpsit* on a promissory note. The first count of the plaintiff's declaration stated, that the defendant, on the twenty-fifth *May*, 1809, at, &c. made his certain promissory note in writing, subscribed, &c. and then and there delivered the same to the plaintiff, by which said note the defendant promised to pay to the plaintiff, or order, one hundred and twelve dollars and fifty-three cents. By reason whereof, &c. There was a demurrer to this count of the declaration, which was submitted to the court, without argument.

It is sufficient to state a promissory note, in the declaration, according to its terms. Where no time of payment is mentioned in a note, it is payable immediately. (a)

*Per Curiam.* It is to be presumed that the plaintiff has stated the note, in his declaration, according to the terms of it, and that is sufficient. The conclusion of the law is, that where no time of payment is specified in a \*note, it is payable immediately. The first count, then, shows a cause of action, and the plaintiff is entitled to judgment.

[\* 375]

Judgment for the plaintiff.

(a) *Thompson v. Ketcham, supra*, 189.

NEW YORK,  
October, 1811.

FITZHUGH

v.

RUNYON.

**FITZHUGH against RUNYON**

*Parol proof to show a mistake in a note or written agreement, is inadmissible.* (a)

IN error, from the Court of Common Pleas of *Tioga* county. The declaration in the court below contained two counts. The first count was on a note or agreement in writing, dated the sixth *March*, 1809, by which the defendant, in consideration of a horse, promised to pay the plaintiff fifty dollars, in good merchantable pork, at the price of fifteen dollars per barrel, or in neat cattle at the appraisal of men, on the first day of *January*, 1810, to be delivered at the then dwelling-house of the said *Fitzhugh*, at, &c. There was also a count for money had and received. The defendant pleaded *non assumpsit*.

At the trial, the defendant offered to prove that there was a mistake in the note, the time of payment being in *January*, 1811, instead of *January*, 1810. This evidence was objected to, but the objection was overruled; and the person who wrote the note at the request of the parties, proved that the agreement was, that it was to be made payable in *January*, 1811, and the jury, under the direction of the court, found a verdict for the defendant, on which judgment was rendered. A bill of exceptions was tendered, on which a writ of error was brought; and the cause was submitted to the court, without argument.

[ \* 376 ]

*Per Curiam.* The parol proof to show that there was a mistake in the written contract, was inadmissible. It \*is a well settled rule, that such proof is never admissible, in a court of law, to contradict a writing. The judgment below must be reversed.

Judgment reversed.

(a) *Thompson v. Ketcham, supra, 189*

NEW-YORK,  
October, 1811.SKELT  
ON  
V.  
BREWSTER.SKELTON *against* BREWSTER.

IN error, on *certiorari*, from a Justice's Court. *Brewster* sued *Skelton* before the justice; and declared on a promise, made by *Skelton*, to pay the amount due on a certain execution against one *W. S.* being the sum of twenty-five dollars. The defendant pleaded *non assumpsit*. On the trial, the plaintiff proved, that *Brewster* recovered judgment, and took out an execution for twenty-five dollars, against *W. S.* and that the defendant, the said *W. S.* delivered all his household goods to the present defendant, who received them, and thereupon, and in consideration that the plaintiff would discharge the said *W. S.* from the execution, promised to pay the plaintiff twenty-five dollars.

Where *A.*, in consideration that *B.* would deliver him all his household goods, and that *C.* would discharge *B.* from execution, promised to pay *C.* the amount of the execution, this was held to be an original undertaking and not within the statute of frauds.  
(a)

*Campbell*, for the plaintiff in error, contended, that the promise being a parol and collateral undertaking, was void by the statute of frauds. He cited 4 *Johns. Rep.* 422. 7 *Johns. Rep.* 463. *Rob. on Frauds*, 225. *Burr. Rep.* 1886.

*Ford*, contra, said, that this case came within the third class of cases stated in the case of *Leonard v. Vredenburgh*; (*ante* 29;) and the promise was to be considered as an original, not a collateral undertaking.

*Per Curiam.* This is not a case within the statute of frauds. The promise of the defendant below, to pay the judgment against a third person, was founded on a new \*and distinct consideration, which was the delivery of the goods of such person, and the plaintiff's discharge of the judgment. It is then to be considered in the light of an original promise, and so the law was declared by this court, in the case of *Leonard v. Vredenburgh*. The judgment must be affirmed.

[\* 377]

Judgment affirmed.

(a) Vide note (a) to *Slingerland v. Morse*, 7 *Johns. Rep.* 463.

NEW-YORK,  
October, 1811

HASBROUCK  
v.  
LOWN.

HASBROUCK *against* LOWN.

In an action of trespass for taking and impounding the plaintiff's hogs. The cause was tried at the *Ulster* circuit, in 1810, before Mr. Justice *Yates*. The defendant proved that he was the agent and servant of *Peter M. Groen*, on whose land the hogs were trespassing, at the time they were taken and impounded by the defendant. It appeared that the hogs were sold at public auction by the pound-keeper, after notice given to the plaintiff.

and it was held

that *G.* was a

competent wit-

ness. (a)

THE defendant offered *Peter M. Groen* as a witness, (after being released by the defendant from all responsibility for costs or damages, &c.) in order to prove that the hogs were taken *damage feasant* on his land.

The plaintiff's counsel objected to his admissibility, notwithstanding the release, and the witness was rejected by the judge. The jury found a verdict for the plaintiff for twelve dollars.

A motion was made to set aside the verdict, and for a new trial, which was submitted to the court, without argument.

[ \* 378 ]

*Per Curiam.* The witness in this case was competent, \*and had he been admitted, his testimony might have made out a complete justification for the defendant. There must be a new trial, with costs to abide the event of the suit.

New trial granted.

(a) *Alderman v. Tirrell, infra, 418. Case v. Reeve, 14 Johns. Rep. 79.*

NEW-YORK,  
October, 1811.CARLILE  
v.  
BATES.

JACKSON, *ex dem.* The Trustees of Union Academy of Stone Arabia, &c. *against* PLUMBE.

THIS was an action of ejectment, tried at the *Montgomery* circuit, in *September* last, before Mr. Justice *Yates*.

After the confession of lease, entry and ouster by the defendant, the plaintiff proved a deed of the land to the lessors in fee; and that the defendant was, at the commencement of the suit, and still is, in possession. The counsel for the defendant moved for a nonsuit, on the ground that the plaintiff had not produced the patent or charter creating the lessors a body corporate; and for want of this evidence the judge nonsuited the plaintiff.

A motion was made to set aside the nonsuit, which was submitted to the court, without argument.

*Per Curiam.* The rule seems to be that when a corporation sues, either on a contract, or to recover real property, they must, at the trial, under the general issue, prove that they are a corporation. (*Hob.* 21. 2 *Ld. Raym.* 1535. 1 *Kyd on Corporations*, 292, 293. *Peters v. Mills, Bull. N. P.* 107.) The nonsuit in this case was, therefore, properly directed.

Motion denied.

(a) *Acc. Bill v. Fourth Western Turnpike Co.* 14 *Johns. R.* 416. *Bank of Utica v. Smalley*, 2 *Cowen*, 770. But in an action by a company incorporated for manufacturing purposes, the plaintiffs need not aver that they had been duly incorporated, as the act authorizing such incorporation is a public law, and the certificate required by the act, on being filed, becomes matter of record. *Dutchess Cotton Manufacturing Co. v. Davis*, 14 *Johns. Rep.* 238.

\*CARLILE, Administrator of CARLILE, *against* BATES.

[\* 379]

THIS was an action of *assumpsit*, on a note given by the defendant to the intestate, for the sum of 90 dollars. At the trial, the jury found a verdict for the plaintiff for 15 dollars. And the question submitted to the court was, whether the plaintiff was entitled to recover costs.

*Per Curiam.* The plaintiff is not entitled to recover costs; and, as he sues as *administrator*, he is not bound to pay costs.

was he obliged to pay costs. See *Mahony v. Fuller*, 2 *Johns. Cases*, 209. (a)

(a) 2 *R. S.* 615, sec. 17. *Id.* 618, sec. 37. *Tilton's Admin. v. Williams*, 11 *Johns. Rep.* 403. *Ketchum v. Ketchum*, 4 *Cowen*, 87. *Prouty's Executors v. McDougall*, 6 *Cowen*, 612. *Palmer v. Palmer*, 5 *Wendell*, 91.

In an action by an *administrator* on a note given to the intestate, for 90 dollars, the jury found a verdict for the plaintiff for 15 dollars; and it was held that the plaintiff could not recover costs, nor

NEW-YORK,  
October. 1811

TRACY

v.

WHIPPLE.

TRACY and VAN RENSSALAER against WHIPPLE,  
Sheriff, &c.

Where a defendant had been surrendered by his bail, and was permitted by the sheriff to go at large within the liberties of the goal, on giving security by bond, according to the statute, and a *ca. sa.* at the suit of the plaintiff was afterwards delivered to the

[\*380] sheriff, who did not take a new bond, and the defendant, on the next day, went beyond the liberties; it was held, in an action for an escape, on the execution, that the mere delivery of the *ca. sa.* was not, *ipso facto, et eo instanti*, an arrest, so as to place the defendant in custody on the execution, and that the sheriff was not liable.

THIS was an action of *debt* for an escape. The cause was tried, at the *Madison* circuit, in *May*, 1811, before Mr. Justice *Yates*.

The plaintiffs gave in evidence a judgment recovered by them against one *W. Weld*, in *August* term, 1807, and a *test. ca. sa.* on which the defendant returned that he had taken *Weld*, and had him in his custody. On the 2d *May*, 1808, *Weld* was *surrendered* by his bail to the custody of the sheriff, at the suit of the plaintiffs, and a bond in due form was given to the sheriff, for the liberties, on which *Weld* was suffered to go within the liberties of the goal; and was within them on the 13th *July*, 1808, when, at 8 o'clock in the evening of that day, the *\*test. ca. sa.* was delivered to the defendant, at his house, within the liberties, *Weld* being, at that time, in a room adjoining to that in which the sheriff was sitting, and the door open between them. The sheriff was then attending to a sick child; and it did not appear that he knew that *Weld* was in the house. When the execution was delivered, the sheriff asked whether the plaintiff's attorney wished it to be served immediately, to which the person who delivered it, answered, that he did not know, but supposed it would make no difference, if it was not served immediately, or until the return of day. *Weld* lived at a house within the liberties, about eighty rods distant from the sheriff's house; and in the morning of the fourteenth *July*, he went a few rods beyond the liberties, but returned in a few minutes. He was seen within the liberties until the twentieth *July*, when he was committed to close custody on the *ca. sa.* and he was afterwards discharged under the act for the relief of prisoners, &c. by the Court of Common Pleas, in *January*, 1809.

It appeared, also, that before the delivery of the execution to the defendant, a writ had been taken out against him by the plaintiffs, for an escape on the execution, and a coroner requested to serve it the next morning; but that writ was afterwards quashed, and the present suit instituted.

The jury under the direction of the judge, found a verdict for the defendant.

*Platt*, for the plaintiffs. The bond taken by the sheriff, for the liberties, was not only for his security, during the debtor's confinement on *mesne process*, but until he should be dis-

charged by due course of law. The delivery of the execution, afterwards, (2 R. S. 433, s. 40,) did not discharge the bond. The statute (*sess. 24. c. 91*) says, that "it shall be the duty of the sheriffs to permit any prisoner who shall be in their custody on civil process only, to go at large within the liberties," provided the prisoner shall \*give a security by bond. It makes no distinction between *mense* and *final* process. The statute did not intend that the sheriff should be obliged to take a *new* bond, or new security, whenever a *ca. sa.* was delivered to him.

NEW-YORK,  
October, 1812

TRACY  
v.  
WHIPPLE.

[ \* 381 ]

The defendant was in custody, on the surrender by his bail. An actual arrest on the *ca. sa.* was not necessary; but the delivery of the *ca. sa.* to the sheriff was a constructive arrest. (1 *Salk.* 273. 3 *Com. Dig. Execution*, 302. 5 *Co. 89. Esp. N. P.* 605.) And from the circumstances stated in the case, an actual arrest is fairly to be presumed. The debtor was in the house of the sheriff, and within his view, at the time the execution was delivered to him; and it is right to presume that he did his duty by arresting him.

The defendant, then, having a bond as security for the liberties, this case is precisely within that of *Tillman v. Lansing.* (4 *Johns. Rep.* 45.)

*Gold, contra.* The decisions in *England*, as to constructive arrests, are applicable only where the debtor is in *arcta custodia*; not in a case like the present, where he is at large within the liberties granted by the statute. In *Atkinson v. Jameson*, (5 *Term Rep.* 28,) the defendant had been arrested and was discharged on the same day, by the sheriff, who did not know that a detainer had been lodged in his office, at the time, at the suit of another plaintiff; and the sheriff arrested the defendant the next day, and it was held that the second arrest was an original taking, and not a retaking after an escape.

Again, the statute requires that the bond taken should be in double the sum for which the debtor is confined. Here the judgment was for two thousand three hundred and eighty-eight dollars and six cents, and the bond was for four thousand dollars only. The present suit is for an escape from custody on a particular execution; and are the bail on *mense* process to be held responsible for the increased risk of an escape on the execution? It was enough, in this case, if the *ca. sa.* was returned with the prisoner in custody, at the return day thereof; and \*it was immaterial where the plaintiff was before. An arrest is not to be presumed, and no arrest at the time of the alleged escape has been proved.

[ \* 382 ]

*Platt*, in reply, said the case of *Atkinson v. Jameson* was

NEW-YORK, not applicable. There the writs were at the suit of different plaintiffs. The only point decided was, that the sheriff had no right of recaption after a voluntary escape. But in the present case, the execution is delivered in the same suit between the same parties.

TRACY  
v.  
WHIPPLE.

There is no distinction between a person in *arcta custodia*, and a person within the liberties; for the liberties are regarded as an extension of the walls of the prison. The debtor is still in prison, and the sheriff must be liable for his escape.

*Per Curiam.* Without considering the question whether the bond taken upon the surrender would operate after the prisoner was charged in execution, the court are of opinion, that the prisoner could not be considered, at the time of the escape, as charged in execution, so as to make the sheriff responsible for that escape, as of a prisoner in execution. The mere delivery of the execution to the sheriff, was not, *ipso facto*, and, *eo instanti*, an arrest, so as to place the prisoner in custody under the execution, by judgment of law. The doctrine in *Frost's* case (5 Co. 89,) does not apply, when the prisoner is not in close custody, but at large upon the liberties of the gaol. These liberties are, in many instances, very spacious, and it might be hours before the sheriff could find the prisoner, so as to secure himself against the increased responsibility which the escape of a prisoner in execution might create. The doctrine in *Frost's* case is founded on the fact, that it would be a useless and idle act to arrest a person already in the close custody of the officer. But a prisoner on the limits is not in such custody, and the sheriff can, on a new arrest, essentially change his \*condition, by requiring new security, or by confining him.

[ \* 383 ]

The only question of fact, is, whether there was an actual arrest, or any act amounting to one, between the time of the delivery of the execution in the evening, and the prisoner's escape the next morning. The case does not furnish any evidence of such an arrest. The presumption is rather the contrary, considering the situation of the sheriff's family at the time, and the conversation which passed between the sheriff and the agent who delivered the writ. There would be no use, then, in granting a new trial, in order to have a jury pass upon that fact; and though the cause was placed upon a different ground at the trial, yet when, upon the view of the whole case, the verdict appears to be correct, the motion for a new trial ought to be denied.

Motion denied.

NEW-YORK,  
October, 1811.

JOHNSON

V.  
SMITHJOHNSON *against* SMITH.IN error, on *certiorari*, from a justice's court.

Smith brought an action of trespass *quare c'ausum fregit*, against Johnson, and for cutting and carrying away wheat. The defendant pleaded not guilty, and a former trial in bar. Upon the trial, and before the jury were sworn, the defendant proved a former *suit*, by the same plaintiff, against him, for *wheat* cut and carried away; on which trial there was a verdict and judgment for the defendant. The justice ruled that this was no bar. The jury were sworn. The plaintiff went on and proved the trespass and cutting, &c. and that the defendant admitted that the wheat belonged to the plaintiff. The defendant offered to prove the former trial in bar, to the jury; but the justice overruled it, and a verdict was found for Smith, on which the justice gave judgment.

In an action of trespass, *quare clausum fregit*, and for cutting and carrying away wheat, before a justice of the peace, the defendant pleaded a former suit by the plaintiff against him for the wheat, in bar, and it was held good. The rule in this case depends, not on the identity of the action, but on the proof being the same in both

\**Per Curiam.* The testimony offered by Johnson to prove that he had been sued by Smith, for the same cause of action, and had obtained a verdict and judgment in his favor, ought to have been received. It was in support of his plea, and formed a complete bar to the suit. The former suit was for cutting and carrying away wheat, and was for the same cause of action, and though the former action was denominated by the justice, an action of trespass *on the case*, and this was *trespass*, it did not alter the application of the rule, which depended not upon the identity of action, but upon the same proof in both cases. (*Rice v. King*, 7 *Johns. Rep.* 20.) The judgment must be reversed.

[\*384]  
cases.(a)

Judgment reversed.

(a) *Acc. Rice v. King*, 7 *Johns. Rep.* 20. note (a).

NEW-YORK,  
October, 1811.

CRAIN  
v.  
COLWELL.

**CRAIN against COLWELL.**

Where the holder of a note received part payment of the maker of the note, after it fell due, and before calling on the endorser, it was held that the endorser was discharged; and a promise by him to pay the note, made without knowledge of a demand on the maker, and due notice to the endorser, was not binding.

[ \*385 ]

IN error, on *certiorari*, from a justice's court.

*Colwell* sued *Crain*, as endorser of a promissory note, given by one *Gillet* to him. After the note was negotiated and had become due, the plaintiff received part of it of the maker. Three months after it fell due, and a few days after the maker had absconded, the plaintiff demanded the balance of the defendant, who said, he would "turn out notes, though he did not think he was holden, since *Gillet* went away." The plaintiff refused the notes. At a subsequent time, the defendant refused to give them to the plaintiff. There was a judgment for the plaintiff.

*Per Curiam.* *Crain* was not holden as endorser. There was no proof of a demand on the maker, and notice of non-payment to *Crain*, as endorser. As the holder had received part payment of the maker, after \*the note fell due, and two months before he called on the endorser, it is to be presumed that he looked solely to the maker, and gave him credit. This was also a discharge to the endorser. Nor was the promise by the endorser binding, unless upon the terms prescribed, which were refused. It does not appear that the promise was made under a knowledge of the want of a due demand on the maker, and due notice to him; and if he had such knowledge at the time, the promise was conditional, and not binding, except upon the terms imposed. The judgment below must be reversed.

Judgment reversed.

NEW-YORK,  
October, 1811.

JACKSON

v.

CORY.

JACKSON, *ex dem.* COOPER and others, *against* CORY.

THIS was an action of ejectment for a lot of land in *Coopers-Town*, in the county of *Otsego*. The cause was tried at the *Otsego* circuit, in *May* last, before Mr. Justice *Van Ness*.

The lessors of the plaintiff having shown, in the first instance, a good title to the premises, the defendant gave in evidence a *deed* from *W. Cooper* and *A. Craig*, (under whom the lessors of the plaintiff deduced title,) to the *people of the county of Otsego*, bearing date the twenty-second *March*, 1791, for the premises in question, and a *deed* from the *supervisors of the county* to the defendant, dated sixth *October*, 1809, which sale was under the act of the \*twenty-first *February*, 1806, entitled, "An act for raising money to build a court-house and gaol in the county of *Otsego*," by which it was enacted, "that the board of supervisors were *authorized to sell* the then court-house and gaol and *the lot* on which they stood, (being the lot in question,) in such manner as they should think proper."

It was admitted that under the *deed* to the *people of the county of Otsego*, the *supervisors* had, in 1792, erected a court-house and gaol on the premises in question, and that they were used as such, until the sale by the *supervisors* to the defendant. A verdict was found for the plaintiff, subject to the opinion of the court, on a case containing the facts above stated.

*Campbell*, for the plaintiff. 1. The *people of the county of Otsego* were not competent to take a grant of land. To every *deed* there must be parties, a grantee as well as a grantor, and the grantee must be capable of receiving the grant, otherwise the *deed* is void. (2 *Bl. Com.* 296.) Persons capable of granting, or receiving a grant, are either *natural persons*, or *corporations*. The *deed* could not operate as a grant to the *people of Otsego*, in their natural capacities, for there were no persons named; and not being incorporated, they could not take as a corporation. (*Co. Litt.* 3. a. *Com. Dig. Capacity*, B. 1. *Kyd on Corp.* 6. 31.

The act of the legislature, in 1806, did not authorize the *supervisors* to sell any thing more than such right or title as they had.

Conveyances by statute pass no other or different right than that which the party before possessed.

(a) *Vide Jackson v. Hartwell, infra, 422. Hornbeck v. Westbrook, 9 Johns. Rep. 73. North-Hempstead v. Hempstead, 2 Wendell, 109.*

*A.*, in 1791, granted a lot of land to "the people of the county of *Otsego*," on which a court-house and gaol were built by the *supervisors*, in 1792, and used by the county. In 1806, by an act of the legislature the *supervisors* were au-

[ \* 386 ]  
thorized to sell the court-house and gaol with the lot of land on which they stood; and they accordingly sold the land to *B.*

In an action of ejectment against *B.* it was held that the *people of the county* had no capacity to take by grant, and that the *deed* was void. (a)

The act of the legislature, (sess. 24. c. 180,) enabling *supervisors* of counties to take conveyances of land, applies only to conveyances made to the *supervisors* by name.

A grant, to be valid, must be to a corporation, or to some certain person named, who

can take by force of the grant, and hold in his own right or as trustee.

NEW-YORK,  
October, 1811.

JACKSON  
v.  
CORY.

[\*387]

*Sugd. Law of Vendors*, 388.) It will hardly be pretended that the counties are corporations; and it was incumbent on the defendant, if he rests on that ground, to show that they are corporate bodies.

By the act of the eighth *April*, 1801, (*sess. 24. c. 130. s. 8.*) (a) the *supervisors* are enabled to take conveyances of land for the use of the counties. This shows that the legislature did not consider them as corporations.

2. The act of the legislature, passed twenty-first *February*, 1806, (*sess. 29. c. 18. s. 5.*) authorizing the board of supervisors to sell the court-house and gaol with the lot of land on which they stood, in such manner as they might think proper, did not confer on the purchaser \*a title, if there was none in the county or supervisors. It was a private act, and could not authorize the supervisors to convey any other or greater interest than the county possessed. The rights of no persons can be affected by a private act, except the parties to such act. (*2 Johns. Rep. 263. Cruise's Dig. tit. 33. s. 31.*) The legislature, no doubt, were under a mistake, as to the title of the county, when they passed the act.

*Sedgwick*, contra. The defendant is a *bona fide* purchaser from the supervisors who represent the county. The lessors are *estopped*, by their deed, to say that the people of the county had no title. (*Shep. Touch. 51, 52.*)

Again, a deed to the people of the county will pass the land to the supervisors, who represent the county, in the same manner as a deed to the administrators of *A.* without naming them, is good. (*Bac. Abr. Grant, (C.) Vin. Abr. Grant, (A. 4.)*)

Again, the legislature have passed an act to enable the supervisors to sell the land, which gives them the capacity to take it. And it makes no difference, in this respect, whether the act was public or private. *Cooper*, and the other lessors claiming under him, cannot, now, object, for they must be presumed to have consented to the act of the legislature. If it was the intention of the lessors that the land should not pass, they ought to have avoided the grant, before the passing of the act of the legislature.

*Henry*, in reply. The grant was to the *people* of the county, in their collective capacity. It cannot be pretended that they have, collectively, a capacity to take land.

There can be no *estoppel* in this case, for both parties must be bound by an estoppel, or neither. Then there is no mutu-

(a) "Every conveyance of land within the limits of a county, made in any manner for the use and benefit of its inhabitants, shall have the same effect as if made to the board of supervisors." (*1 R. S. 364, sec. 3.*)

ability; for the grantor would be estopped, and the incapacity of the grantee could never be objected, on the ground of an estoppel.

The act of the legislature authorizing the supervisors \*to take, cannot render valid a prior deed to the people of the county; but shows that they had no capacity to take a grant of land.

The act authorizing the supervisors to sell, being a private act, can affect parties only. It is a mere naked authority to sell, without declaring the effect of the sale.

*Per Curiam.* The people of the county of *Otsego* had not a capacity to take by grant. They were not a corporate body known in law. It is a settled rule of the common law, that a community, not incorporated, cannot purchase and take in succession. (*Co. Litt.* 3. a. 10 *Co.* 26. b. *Com. Dig.* tit. *Capacity*, B. 1.) The act of 1801, (*Laws*, vol. 1. p. 561. [Vide 1. *R. S. ut sup.*]) declaring valid certain conveyances to the supervisors of a county, does not apply to this case, for this was not a conveyance to the supervisors. A grant, to be valid, must be to a corporation, or some person certain must be named, who can take, by force of the grant, and who can hold either in his own right, or as a trustee. (*Perkins*, s. 55. 2 *Johns. Cas.* 324.)

Nor can the act of 1806, authorizing the supervisors to sell the premises, be construed to divest the lessors of the plaintiff of their right. It is not to be presumed that the legislature intended to authorize the supervisors to convey any thing more than the right and title which they might have had in the lot. The act was, no doubt, passed under the impression that the supervisors had a legal conveyance for the premises; and from the principles contained in the case of *Jackson v. Catlin*, (2 *Johns. Rep.* 248,) and which has since been affirmed in the *Court for the Correction of Errors*, conveyances by statute are not to be construed to pass any other or different right than that which the party before possessed. To take away private property by public authority, even for public uses, without making a just compensation, is against the fundamental principles of free government; and this limitation of power is to be found, as an express provision, in the constitution of the *United States*.

For these reasons, judgment must be rendered for the plaintiff.

Judgment for the plaintiff.

NEW-YORK,  
October, 1811.

JACKSON  
V.  
CORY.  
[\*388]

[\*389]

NEW-YORK,  
October, 1811.

PUTNAM  
v.  
LEWIS.

Giving a promissory note is no payment of a book debt. It only suspends the right of action during the time allowed for payment, by the note. And a receipt in full of all demands, for such book debt, does not preclude the plaintiff from showing the circumstances under which it was given. And the note not having been paid, the plaintiff was held entitled to recover the amount of his book debt, with interest from the time the note was payable.

(a)

PUTNAM against LEWIS, Administrator of LEWIS.

THIS was an action of *assumpsit*, for medicine and attendance as a physician, &c.

The case was tried at the *Madison* circuit, before Mr. Justice *Yates*, in *May* last. The plaintiff proved his demand as stated in his account, to be fifty-three dollars and ninety-six cents. The defendant gave in evidence a receipt, signed by the plaintiff, as follows: "Received of *George R. Lewis*, fifty-three dollars and ninety-six cents; it being in full of all demands which I have against the estate of *Eber Lewis*, late of *Fabius*, deceased. *Madison, March 19, 1810.*"

To repel the receipt, the plaintiff proved that this action was commenced the twenty-seventh *February*, 1810, and the *capias* returned *non est inventus*. In *March* following, the plaintiff gave directions to his attorney to stay the suit, on the defendant's paying the costs. The defendant told the plaintiff's attorney, that he had settled the suit with the plaintiff, by giving his note, and was to pay the costs, and, being informed of the amount of the costs, promised to pay them in two or three weeks; but not having paid the costs, the attorney of the plaintiff issued an *alias capias*, in *August*, on which the defendant was taken. It appeared that the defendant had paid the plaintiff five dollars in part of his demand; and the plaintiff offered to produce and cancel the note given him by the defendant. The judge charged the jury to find a verdict for the plaintiff, for the balance, with interest \*from the time of settlement; and a verdict was found accordingly.

A motion was made to set aside the verdict on a case agreed upon, which was submitted to the court, without argument.

*Per Curiam.* Giving the note was no payment of the book debt. It could only suspend the right of action, during the period allowed for payment of the note. (*Herring v. Sawyer, January term, 1802, MS.*) The time of payment in the note does not appear, and it was the business of the defendant to have shown it, if he relied upon that point, as a defence. As it is, we are to presume the note was due when the writ was issued in *August*, 1810. The receipt did not preclude the plaintiff from showing the facts and circumstances under which it was given. This is a well settled point in this court. The recovery was accordingly correct, and the account being liquidated and agreed to, it of course carried interest.

Motion denied.

(a) *Vide Schermerhorn v. Loines, 7 Johns. Rep. 321*, and the cases there collected.

NEW-YORK,  
October, 1811.PROUDFIT  
v.  
HENMAN.DEAN and CHAMBERLAIN *against* ALLEN.IN error, on *certiorari*, from a justice's court.

The plaintiffs in error brought an action of *deceit* against *Allen*, for delivering whiskey, by false measure, and for fraudulently, in their absence, using their distillery and wood.

The defendant pleaded a former suit and recovery, in bar, commenced by him against the plaintiffs, on a *contract*, in which suit the plaintiffs ought to have set off their demand. There was a demurrer to the plea, on which the justice gave judgment for the defendant.

In an action for *deceit*, before a justice, a plea of a former suit by the defendant against the plaintiff on a *contract*, in which the present plaintiff neglected to set off his demand, is no bar. (a)

\**Per Curiam.* This action was for a *tort*, and not on any *contract* expressed or implied. *Deceit* was the *gist* of the action, and it could not have been joined with a count in *assump-sit*. (1 *Johns. Rep.* 503.) The former judgment was no bar, because this cause of action could not have been set off in the former suit, and the judgment below must be reversed.

[\*391]

Judgment reversed.

(a) *Acc. Allen v. Horton*, 7 *Johns. Rep.* 24, and the cases there cited in note (a).PROUDFIT *against* HENMAN and HENMAN.IN error, on *certiorari*, from a justice's court.

The defendants in error sued the plaintiff in error for overflowing their land by his mill-dam. Issue was joined and a *venire* returned, on the twenty-eighth of *February*. By agreement between the parties, the cause was adjourned to the twenty-second *August*. The plaintiffs appeared, but the defendant did not appear. The plaintiffs stated that the defendant and they had agreed to adjourn further, until notified by the plaintiffs, and that they had given notice for the nineteenth *September*; and the plaintiffs also made oath, that they could not safely proceed to trial, for the want of a material witness, who lived at a distance. The cause was adjourned to the nineteenth *September*. The plaintiffs then appeared, and the defendant did not appear, and a judgment was given for the plaintiffs.

Where a justice adjourned a cause, on the suggestion of the plaintiff, that the defendant had agreed to an adjournment, and, on the affidavit of the plaintiff, of the absence of a material witness, without showing due diligence to procure his attendance, it was held that the justice had not an unlimited discretion to adjourn at his

suggestion of the plaintiff, and that such adjournment was a discontinuance of the cause. (b)

(b) *Acc. Payne v. Wheeler*, 15 *Johns. Rep.* 492.

NEW-YORK,  
October, 1811.

PHILIPS  
v.  
ROSE.  
[\*392]

*Per Curiam.* The last adjournment was without proof of any consent by the defendant. It was upon the suggestion of the plaintiffs, and without authority. The plaintiffs did not show that they had used due diligence to procure the attendance of the absent witness, nor at what distance he lived. There is no provision in the act \*giving to the magistrate unlimited discretion to adjourn, for any length of time, upon the suggestion, and at the pleasure of the plaintiff. This adjournment amounted to a discontinuance, and the cause was out of court.

Judgment reversed.

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PHILIPS and BUTLER *against* ROSE.

Where the plaintiff covenanted to build a mill in a certain place, and by a certain time, and in an action of covenant, averred that he erected the mill at the place, and by the time mentioned in the agreement; it was held, that parol evidence that the mill was erected at a different place, and after the time, by the consent and agreement of the defendant, did not support the declaration. (a)

This was an action of covenant, on articles of agreement, made between the parties the twenty-third *March*, 1804, by which the plaintiffs agreed to erect a frame of certain dimensions, on a certain lot, for an oil-mill, on or before the fifteenth *June* following; and the defendant agreed to make the press and other machinery for the mill, and to complete the mill; the plaintiffs finding all materials and boarding the workmen, &c. and when the mill was completed, the plaintiffs agreed to procure and lay in four thousand bushels of flax seed, and the defendant to make it into oil, &c. and after reimbursing the plaintiffs out of the sale of the oil, the residue was to be divided in certain proportions, between the parties; and the defendant agreed to lend the plaintiffs one thousand one hundred dollars, on the first *September*, for six months, for which the defendant was to be allowed one hundred dollars, and to retain the one thousand one hundred dollars out of the proceeds of the first sales.

The declaration recited the agreement, and the plaintiffs averred that they fulfilled their part of it, as to erecting the frame of the mill, by the fifteenth *June*, &c. and alleged a breach of the agreement on the part of the defendant.

The cause was tried at the *Onondaga* circuit, the third *June*, 1811, before Mr. Justice *Yates*.

The plaintiffs, after proving the agreement, gave in evidence, that the frame of the mill was erected, but not \*until the fifteenth *September* following the eleventh *June*, 1804; and that the defendant declared afterwards, that it was immaterial whether the frame was erected by the fifteenth *June*, or not, and that its not being finished by the fifteenth *June*, was no

[\*393]

(a) *Vide Keating v. Price*, 1 *Johns. Cas.* 22. *Freeman v. Adams*, 9 *Johns. Rep.* 115.

damage to him, as he had not procured the workmen, or the money. This evidence was objected to, but admitted. *Parol* evidence was also admitted to show, that though the mill was not erected on the spot mentioned in the agreement, and though it was not of the exact dimensions specified, the defendant had consented to the alterations, and assisted in fixing the spot, and directing the workmen in erecting the building. This evidence was objected to, as not supporting the declaration, but it was admitted by the judge. The plaintiffs proved that the defendant performed no part of his agreement; and the jury found a verdict for the plaintiffs, for forty-eight dollars and sixty-three cents, damages, subject to the opinion of the court on a case. It was agreed, that if the court should be of opinion in favor of the defendant, a judgment of nonsuit should be entered.

The case was submitted to the court, without argument.

*Per Curiam.* This case falls precisely within that of *Little v. Holland*, in the K. B. (3 Term Rep. 590.) The contract must be proved, as it is laid, otherwise the defendant has no notice of what he is called upon to answer. Evidence that the contract was enlarged by *parol* agreement, will not support the declaration. According to the stipulation in the case, a judgment of nonsuit must be entered.

Judgment of nonsuit.

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\*JACKSON, *ex dem.* BUTLER and others, *against* GARDNER.

[ \* 394 ]

This was an action of ejectment, for part of lot number ninety-eight, together with the waters and banks of the creek or stream running through it, for the use of the mills, in the town of *Manlius*, in the county of *Onondaga*. The cause was tried before Mr. Justice *Yates*, at the *Onondaga* circuit, in *June* last.

lease. It was held, that if the old lease was not duly surrendered by writing, within the statute of frauds, yet that *A.* could recover no more land than what he could prove, with absolute certainty, was covered by that lease, especially, after the premises claimed had been in the possession of another, for near sixteen years. (a)

*A.*, on the twelfth *December*, 1793, gave a lease to *B.* of a part of a lot of land for sixty years; and on the twenty-sixth *December*, 1793, executed a deed in fee for part also of the same lot. *C.* took immediate possession, under his deed, and continued in possession near sixteen years; *B.* afterwards claimed part of the premises in the possession of *C.* as comprised in the lease to *B.* It was held that the deed to *C.* was valid, notwithstanding the lease, and that *B.* could not set up any new location, so as to invade the possession of *C.*

Every exception and uncertainty in a deed is to be taken favorably to the grantee. (b)

(a) *Vide infra*, 404, note (a).

(b) A deed is to be construed most strongly against the grantor, and if it can enure in different ways, the grantee may take it in such a way as shall be most to his advantage. *Jackson v. Blodget*, 16 Johns. Rep. 172. \*

NEW-YORK,  
October, 1811.

JACKSON  
v.  
GARDNER.

NEW-YORK,  
October, 1811.

JACKSON  
v.  
GARDNER.

The following evidence was given, on the part of the plaintiff.

1. A power of attorney from *James Hamilton*, dated the twelfth *December*, 1793, to *Adam Wood*, authorizing him to demand and sue for a set of grist-mill irons and other articles in the possession of *Phineas Stephens* and *Daniel D. White*, and to recover the rent of a saw-mill, lately erected by *Stephens*, and damages for cutting and carrying away any pine timber from a certain piece of land in *Manlius*, in the possession of *John Johnson*, &c.

2. A deed from *James Hamilton* to *Charles Mulhollen* and his wife, dated twenty-sixth *December*, 1793, by which (for the consideration of five shillings, and of *Mulhollen*'s returning a deed of gift from *Hamilton* to him, of lot fifty-five, in the fourteenth township of the military tract in the county of *Herkimer*) *Hamilton* conveyed to *Mulhollen*, in fee, part of lot ninety-eight, in *Manlius*, (containing six hundred acres,) two hundred acres of the north-east corner having been sold to *Stephens*, and two hundred acres to *Wood*, and forty acres to *Rosemark*, both off the south-east corner; all the rest was granted to *Mulhollen* and his wife and their heirs, to *have and to hold*, to the use of *Charles Mulhollen* and his heirs, &c. This deed was registered the twenty-third *April*, 1795.

[ \* 395 ]

3. A deed dated the twenty-third *November*, 1796, from *James Hamilton* to *Charles Mulhollen*, by which, in consideration of love and affection, and the sum of five shillings, he conveyed to him part of lot number ninety-eight, beginning at the north-east corner of *Stephens*'s lot, and running thence, westerly along the line of *Stephens* to the creek and crossing it, and up the creek to the line of *Wood*, &c. &c. being two hundred acres, and with a *proviso*, that the grantee shall not erect any mill on the water-course, under the penalty of forfeiting the land. This deed was registered the seventh *February*, 1797.

4. The copy of a *second lease*, (the original having been burnt by accident, and the first surrendered,) dated twenty-ninth *January*, 1794, from *James Hamilton*, by *Jonas Platt*, his attorney, to *Aaron Wood*, for sixty years of two parcels of land in lot number ninety-eight, in *Manlius*. The second parcel is described as bounded easterly by *Stephens*'s land, southerly by the mill creek, westerly by lot number ninety-seven, being all that part of lot number ninety-eight lying on the easterly side of said creek, except what had been sold to *Johnson* and *Stephens*; and also, so much of the bank on the west side of the creek, as may be necessary for the purpose of erecting mills and mill-dams, which part is to be surveyed and designated by *Moses Dewitt*.

5. A letter, dated *January 25, 1794*, from *James Hamilton*,

in which he says, "Measure two hundred acres, besides *Johnson's* and *Stephens's*, on this side of the creek, and on the other side, square out, as I intend to let it also. I mean what *Wood* does not take of the land." "Let Mr. *Wood* leave as much as is necessary for mills, on both banks of the creek, in his measurement."

NEW-YORK,  
October, 1811.  
JACKSON  
v.  
GARDNER.

6. *Thaddeus M. Wood*, a witness for the plaintiff, testified that he was present when the *first* lease was surrendered, and the second lease, above mentioned, given in its stead. The first lease was then destroyed, without any writing to show the surrender; but the witness was not certain as to the manner in which the first lease was \*surrendered and destroyed. The first lease was given by *Hamilton* to *Aaron Wood*, on the twelfth *December*, 1793, for two hundred acres of lot number ninety-eight, to be taken from the south-easterly corner of the lot, so as not to interfere with the previous purchase of *Johnson*, of forty acres, or that of *Stephens*, of two hundred acres. It was the impression of the witness that the lease was to include the whole creek, and to continue for the term of sixty years, at an annual rent of seven pounds, for each hundred acres; and the witness thought he was a witness to that lease. *Dewitt* died in the summer of 1794, before any survey of the premises was made. On his cross-examination, the witness said, "he would not undertake to say whether the first lease included the privilege of the whole stream running across the lot, but, according to his impression, it did include it."

7. A certificate or memorandum, by *Jonas Platt*, dated twenty-ninth *January*, 1794, endorsed on another instrument in writing, which was not proved, but which purported to be an assignment from *James Hamilton* to *Aaron Wood*, of his interest in a lease by him given to *Phineas Stephens*, for a saw-mill first erected, and was dated twelfth *December*, 1793, and referred to a lease which had been given by *Hamilton*, of that date. By this certificate and memorandum, it appeared that a lease from *Hamilton* to *Aaron Wood* had that day been surrendered up by *Wood*.

8. *Jonathan Foster*, a witness, testified, that two or three days after the twenty-fifth *December*, 1793, he saw, at the house of *Aaron Wood*, a lease from *James Hamilton* to *Wood*, of two hundred acres of land, in lot ninety-eight, in *Manlius*, to be taken from the south-east part, so as not to interfere with the farms of *Johnson* and *Stephens*; and to be surveyed by *Moses Dewitt*, in a square, as near as might be, southerly of *Stephens's* land, and to extend westerly over the creek, so as to make up the quantity. The creek throughout the whole lot was included in the lease, and the banks \*of the creek, at least as far as the north bounds of the two hundred acres, if not farther, were also included for the use of the mills. The

[ \* 396 ]

[ \* 397 ]

NEW-YORK,  
October, 1811.

JACKSON  
v.  
GARDNER.

lease was for sixty years. He said that as the creek had not been traversed, it was not known whether the two hundred acres would overrun the creek or not; but it was not to extend farther north than the south bounds of *Stephens's* line, to make up the two hundred acres. He was not certain that the lease included the banks of the creek farther than the extent of the two hundred acres.

9. *Elijah Phillips*, also, testified, that he saw the *first* lease in the latter end of the year 1793, or the beginning of 1794: it was for two hundred acres out of the south-east corner of the lot ninety-eight, together with the creek and its banks throughout the lot, for the use of the mills. He said he saw the lease but once, and is not certain whether it was a lease or a contract for a lease; and he did not remember the exact boundaries, but the two hundred acres were not to extend farther north than the south side of *Stephens's* land.

10. *James Geddes* testified, that if the two hundred acres contained in the first lease, were so located as to include all the land south of *Stephens's* land, excepting *Johnson's* and extending westerly, with a north line corresponding with *Stephens's* south line, so far as to include the quantity of two hundred acres, it would encroach on the defendant's farm, about eight chains and a half, or twenty-four acres, leaving the defendant's mills, and about eleven chains and a half north.

11. *Garrit Van Slyck* testified, that the defendant was in possession some distance south of the line of the two hundred acres, located as aforesaid; and was informed of *Wood's* claim to the water of the creek, when he took possession.

On the part of the defendants, *J. Platt* testified, that, as agent of *Hamilton*, he received from *Aaron Wood*, in *January*, 1794, a surrender of the first or old lease, or \*contract for a lease, he was not certain which, and that it was destroyed, and a second or new lease given. Whether there was any agreement in writing to surrender, he could not recollect. It appeared that *Charles Mulhollen*, and those claiming under him, have had the entire and exclusive possession of all the land included in *Hamilton's* deed to *Mulhollen*, of the twenty-sixth *December*, 1793. That neither *Aaron Wood*, nor those claiming under him, have ever had possession of the lot, excepting the part which lies between *Stephens's* land and *Johnson's* land, and bounded westerly by the creek. *Mulhollen* lived on the land until his death, about five years ago, and made valuable improvements. It appeared that there were above twenty houses and many mills, erected on the premises.

A verdict was taken for the plaintiff, subject to the opinion of the court, on a case containing the facts above stated.

*Gold*, for the plaintiff. 1. By the lease of *Hamilton*, of  
304

the twelfth *December*, 1793, a title to the two hundred acres of land, and all the waters and banks of the creek, throughout lot No. ninety-eight, was vested in *Aaron Wood*. And it could not be affected by the deed to *Mulhollen*, of the twenty-sixth *December*, 1793, there being then an outstanding and subsisting title in *Wood*, under the first lease.

2. There is no evidence that the first lease was surrendered, by any express or *written* contract for that purpose. By the tenth section of the statute for the prevention of frauds, a surrender of a lease or interest in land must be in writing. (*Sess. 10. c. 44. [2 R. S. 134. s. 6.]*) On the contrary, the evidence of the giving up and destroying the lease, shows that there was not a surrender in writing. The word *surrender*, *ex vi termini*, means a *surrender in writing*. If an express surrender is relied upon by the defendant, he is bound to show it in writing. The *\*acceptance* of a new lease does not necessarily imply a surrender of the old. In *Wilson v. Sewall*, (*Burr. Rep. 1975. 1980.* and see *Hutton*, 105. *Sir Wm. Jones's Rep. 405, 406. 1 Saund. 236. c. note (9.)* the court say, that the acceptance of a bad lease, is not an implied surrender of a good one.

In the case of *Roe v. York*, (6 *East*, 86,) the subject, as to the surrender of leases, is fully discussed, and all the authorities are cited. It is there held, that the mere cancelling or destroying a lease, is not a surrender of the term; and though a new lease was given, expressly in consideration of the surrender of the old, yet as the lessor had no power to give such a lease, the acceptance of the second lease was not deemed a surrender of the first, though the lessee knew of the defect of power.

In order that the acceptance of a new lease should produce a surrender of a former one, it should be for the same thing, or same premises. (*Co. Litt. 338. a. note (2.) Shep. Touch. 301.*)

Again, if *Hamilton's* deed to *Mulhollen* included the premises, then there was no reversion in *Hamilton*, on which the surrender could operate. A surrender is the yielding up of an estate for life, or for years, to him who has the immediate estate in reversion or remainder. (3 *Bac. Abr. 457. Leases*, (8.) 1 *Saund. 235. c. note (9.) Co. Litt. 337. a. n. (2.)*

Whether the delivering up, or cancelling a lease or deed, could extinguish the estate, appears to have been much discussed in *England*; (*Co. Litt. 338. note (1.) Gilb. Rep. 236. 2 Ch. Cas. 100. 20 Vin. Abr. 143. Surrend. (L) pl. 10. 2 Johns. Rep. 84. 87;*) but it is now fully settled that it does not; and that, since the statute of frauds, it must be in writing.

Again, if the premises had not been excepted in the deed to *Mulhollen*, and there had been a technical surrender of the lease to *Wood*, *Hamilton* would not have been *estopped*, as

NEW-YORK,  
October, 1811  
JACKSON  
v.  
GARDNER

[\*399

NEW-YORK,  
October, 1811.

JACKSON  
v.  
GARDNER.

between him and *Mulhollen*, to aver the truth, that the title, being then in *Wood*, could not pass to *Mulhollen*. Where an estate passes by deed, an *estoppel* cannot arise on it. If *A*, a tenant for the life of *B*, lease for years, and he purchases the reversion, and *B*. dies before the expiration of the lease, *A* is not estopped, but may confess and avoid. (*Co. Litt.* 43. a. 47 b. *Bac. Abr. Leases*, (O.) 8 *Term. Rep.* 487. 1 *Burr.* 125.)

[ \* 400 ]

\**Estoppels* on conveyances with warranty, were introduced to prevent a circuitu of action. (*Co. Litt.* 265. a.) The doctrine is, that the grantor shall not allege that nothing passed by his deed, thereby making it a nullity; but he may allege that so great an estate did not pass. And if the defect of title is recited in the conveyance, there is no estoppel. (1 *Lord Raym.* 729.)

3. *Mulhollen* never claimed the waters of the creek, or pretended to dispose of them; and he is estopped by the deed of November twenty-three, 1796, to set up any mills, or to assert any title to the waters.

4. The deed of the twenty-sixth December, 1793, from *Hamilton* to *Mulhollen*, being a voluntary deed of gift, with a mere nominal consideration of five shillings, is void under the statute, as to the subsequent lease to *Wood*, which was given for a valuable consideration. A voluntary conveyance is void against a subsequent purchaser, for a valuable consideration, though such subsequent purchaser had notice of the voluntary conveyance. Though the universality of this proposition was once questioned, in *England*, it is now settled, as being a necessary doctrine to guard against fraud. (*Newland on Contracts*, 391. *Rob. on Fraud. Convey.* 66. 213. *Shep. Touch.* 62. 63. (*Deeds*, d. 4.) *Cowp.* 278. 5 *Co. 60.* 2 *Bro. Ch. Cas.* 148.) The words, "purchasers for money or other good consideration," in the third section of our statute, (*sess. 10. c. 44.*) and "for good consideration, and *bona fide*," used in the sixth section, are the same words as are used in the statute of twenty-seventh *Eliz.* c. 4. [Vide 2 *R. S.* 134. sec. 1. 2. 3.]

A consideration, to be *valuable*, within the statute, must be, in some degree, adequate. Five shillings, and other valuable considerations, have not been held to amount to a valuable consideration, within the twenty-seventh *Eliz.* (*Sugden's Law of Vend.* 431. *Rob. on Fraud. Convey.* 373. *Cro. Eliz.* 445. *Salk.* 94.)

A consideration, which would raise a use to support a bargain and sale, is not sufficient to create a valuable consideration within that statute. (*Rob. on Fraud. Convey.* 474.) A lease on which reat is reserved, is considered as a revocation of a voluntary conveyance. (*Cro. Jac.* 180.)

[ \* 401 ]

\*5. It may be objected that the lease to *Wood* not being 306

registered or deposited, pursuant to the act of *January*, 1794, extended to *May*, 1795, is void. But there was *notice* to *Mulhollen* of the lease, which is equivalent to a *registry* of it. (*4 Cruise's Dig.* 353. *Newland on Cont.* 509. 1. *Str.* 664. 3 *Atk.* 646. 2 *Ves.* 655. *Amb.* 624.)

NEW-YORK,  
October, 1811.  
JACKSON  
v.  
GARDNER

*Clark* and *Platt*, contra. The lessors were bound to show a good title. The destruction of the old lease and its contents, ought to have been fully proved. The execution of the first pretended lease was not proved, (*3 Johns. Rep.* 303. *Gilb. on Ev.* 98.) and none of the witnesses speak of its contents with any certainty. The acceptance of a new lease by *Wood*, shows that he did not rely on the old lease, in order to cover the banks of the creek, and the mill-seats. The surrender, by *Aaron Wood*, of the original lease, in *January*, 1794, enured to the benefit of *Mulhollen*, the reversioner. The evidence is sufficient to warrant the conclusion, that this surrender was by deed, or note in writing, according to the statute.

If it was not in writing, it was a surrender by act and operation of law. Surrenders in law, or surrenders by implication, remain as before the statute.

Surrenders are favored in law. (*Co. Litt.* 238. a.) No particular words are necessary to constitute a surrender; it may be collected from the intention of the parties, appearing on the instrument executed by them. (*Shep. Touch.* 305.) It is a species of common law conveyance, and operates by *merger* of the *less* estate in the *greater*.

Delivering up a lease, and taking a new lease in writing, is a valid surrender; the new lease being of equal notoriety with a formal surrender in writing. (*Gilb. Eq. Rep.* 236. 4 *Bac. Abr.* (*Leases,*) 212.)

If a lessee for years takes a lease of the same premises, without delivering up the old lease, it is a surrender by operation of law. (*Co. Litt.* 337. b. *Harg. & Butler's notes.* 2 *Roll. Abr.* 495.) *Fortior et equior est dispositio legis quam hominis.*

A surrender operates without an express acceptance, or even notice to the reversioner. His assent is implied. \*It is like sealing a bond to a person, in his absence, which makes a valid obligation immediately, without notice, and can be annulled only by an express refusal. (*2 Salk.* 618. *Bro. P. C.* 150, 151. *S. C. Co. Litt.* 338. b.)

[\* 402]

In *Mellow v. May*, (*Cro. Eliz.* 873. *Moore*, 636. *Keb.* 285,) it was held, that if a lessee takes a new lease of the same land, it is a surrender of the first lease, although the second lease be void, from any defect in the making of it; for the acceptance of the new lease is a surrender of the old, which cannot be set up, although nothing was received for it.

NEW-YORK, October, 1811. A contract for a new lease is good evidence to a jury, of a surrender.

JACKSON  
v.  
GARDNER.

The cases cited by the plaintiff's counsel, from *Burrow, Sir William Jones, and 6 East*, all rest on the ground of fraud: there was a *suppressio veri*. They are not applicable to the present case, where there is no pretence of fraud, but a fair disclosure of the previous conveyance to *Mulhollen*. The second lease is good and operative for all that part of the land, not previously sold to *Mulhollen*. No injury is done to the lessee, who is not obliged to pay rent, for the part in the possession of *Mulhollen*.

Again, here was no possession or rent paid for sixteen years; and after so long and quiet possession by another, a surrender or regular re-entry will be presumed. (2 *Caines*, 382. 1 *Ch. Rep.* 108. 1 *Vern.* 132. 195.)

The cases cited by the plaintiff's counsel to show that *Hamilton* was not estopped from denying the effect of his deed to *Mulhollen*, have no application to the present case; because the delivering up the old lease, and taking a new one, did not operate as an assignment to *Hamilton*, but as a surrender to *Mulhollen*, the *reversioner*. The term was *merged* or extinguished, not *assigned*.

The deed of the twenty-sixth *December*, 1793, from *Hamilton* to *Mulhollen*, was for a valuable consideration, the returning a deed of gift of other lands, and five shillings. It must be intended, that the deed of gift was duly assigned, when the exchange was made. If not, a court of chancery would compel *Mulhollen* to execute a conveyance, on the ground of a performance by *Hamilton*; and this \*court may presume that to be done which ought to have been done, and which the party might be compelled to do.

[\* 403] But admitting it was a mere *voluntary* conveyance, it cannot be impeached by a subsequent deed for a valuable consideration; unless the second purchaser is a *creditor*, who has been defrauded by such voluntary conveyance.

Again, the leases to *Wood* were void, because not registered or deposited according to the act of 1795. (2 *Rev. Laws*, 262. [1 *R. S.* 756. sec. 1. *Id.* 762. sec. 38.])

*Hamilton's* deed of the twenty-third *November*, 1796, was produced at the trial, on the part of the plaintiff; and there was no evidence of *Mulhollen's* assent to it. If he did assent, as it was for the same premises, it amounted to a *confirmation*, not a *surrender*, of the first deed.

The claim or right to the *mill-stream* and its banks, for the *use of mills*, is a mere incorporeal hereditament, (4 *Johns. Rep.* 83,) and cannot be recovered in an action of *ejectment*. The right was contingent, and for a special purpose, and did not include a right to the soil. By a grant of a stream of 308

water, the soil does not pass. (*Co. Litt.* 4. b.) If by any natural cause, the stream should be diverted or dried up, the bed of the stream and the banks would belong absolutely to the grantor, as if no such lease had ever been made.

The *notices* given by *Butler* and *Philips* can have no effect; for they showed no title in themselves, or under *Wood*. They are to be regarded as mere *strangers* to the defendant.

If the evidence is fairly weighed, the balance will be found in favor of the supposition that the original lease did not include the stream throughout the whole lot; but only so far as the two hundred acres extended.

Again, there is another and conclusive objection to the plaintiff's claim. *Aaron Wood* having *voluntarily destroyed* the original lease, has thereby destroyed his title. (*Shep. Touch.* 70. *Dyer*, 112. *Bac. Abr. Leases*, (T.) *Gib. on Ev.* 103. 113. 11 *Co. 27. b.* 4 *Com. Dig. Fait*, (E.) He cannot be allowed to give *parol* evidence of its contents. Unless he can show that the lease was destroyed without <sup>\*</sup>his own fault or assent, he must be held to the strict rule which requires the highest kind of evidence; otherwise, the party might always elect whether to produce the *highest* or the *lowest* species of evidence.

*Per Curiam.* The claim of *Wood* to the premises is founded on the supposed lease of the twelfth of *December*, 1793, and the lease of the twenty-ninth of *January*, 1794. He shows no other title than what one or the other of these leases may give him.

1. As to the lease of 1793. This lease was voluntarily surrendered by *Wood* to the agent of *Hamilton*, the lessor, and destroyed on the twenty-ninth of *January*, 1794, when he accepted of a new lease. Admitting that this lease was not surrendered, in due form of law, (a) according to the requisition of the statute of frauds, so as to devest *Wood* of his interest under it, yet the existence and contents of this lease were not proved with sufficient certainty to justify the plaintiff's claim. As *Wood* voluntarily surrendered this deed to be destroyed, he ought not to avail himself of any obscurity or uncertainty, in respect to its contents. Every difficulty and presumption ought to be turned against him. He ought not to recover any land under that lease, but what appears, with absolute precision and certainty, to have been covered by it. And what is the testimony on this point? The proof of the execution of the lease is very loose. *T. M. Wood* says, that he thinks

(a) If a lessee for years, or for life, accept a new lease, or a grant in fee of the same premises, this, without any actual surrender of the old lease, is a surrender of it in law. *Livingston v. Potts*, 16 *Johns. Rep.* 28. *Van Rensselaer's Heirs v. Pennington*. 6 *Wendell*, 509.

NEW-YORK.  
October, 1811.  
JACKSON  
v.  
GARDNER.

[\* 404]

NEW-YORK,  
October, 1811.

JACKSON  
v.  
GARDNER

[ \* 405 ]

that he subscribed it as a witness; and there is much less proof that his instrument was an actual lease or conveyance of the land. *Philips*, who saw it once, was not positive whether it was a lease, or only a contract for a lease; and *Platt*, who received it, when surrendered, is equally uncertain on this point. But the location and extent of the lands conveyed, is shrouded in absolute uncertainty. *T. M. Wood* says it was for two hundred acres, in the south-east corner of the lot, but whether it was to include the whole creek, he \*could not say, though that was his impression. The land, he says, had not then been surveyed. *I. Foster*, who saw it in *December*, 1793, was not certain whether it secured the banks of the creek farther than the extent of the two hundred acres; and he said it was not to extend further north than the south bounds of *Stephens's* land; but that as the creek had not then been traversed, it was not known whether the two hundred acres would run over the creek, or not. *E. Philips* confirms the grant of the same bounds, though he adds that he did not remember the bounds exactly.

To support a claim to the creek and lands of the defendant, after a lapse of sixteen years, upon such proof of the contents of a lease, so long ago voluntarily destroyed, by the consent of the party himself, and when, perhaps, the evidence of a valid surrender in writing existed on the lease, would be to create an extravagant and dangerous precedent. It was incumbent on the plaintiff to have stated its bounds with precision, or to have shown the reduction of those vague bounds to certainty, by an actual location at the time. There would not have been any inducement to the surrender, and for such anxiety as *Wood* discovered for a new lease in *January*, 1794, if the first lease covered the creek in question. The plaintiff ought now to be confined to such location of the two hundred acres, in and adjoining the south-east quarter of the lot, as can be made consistently with the defendant's right; and there is land enough for such a location. It is not improbable that the quantity of acres may have depended on the contents of the land within certain definitive bounds, such, for instance, as south of *Stephens's* land, and east of the creek; and this supposition is the more plausible, because it appears that *Wood* never actually exerted any ownership or possession further west.

[ \* 406 ]

The title, then, to the premises, as founded on the first lease, must fall to the ground, and this source of title \*was properly abandoned upon the argument, by one of the counsel for the plaintiff. (a)

2. The cause depends upon the operation and extent of the deed to *Mulhollen*, of the twenty-sixth of *December*, 1793;

(a) The reporter was absent, and did not hear the counsel in reply.

for if that deed does not cover the premises, the second lease to *Wood* undoubtedly does. No well founded objection can be made to the validity of this deed, and the single inquiry is touching its extent. It conveys the whole lot with the exception of *Stephens's* two hundred acres, and "two hundred acres to *M. Wood*, and *Rosemark's* forty acres, both being taken off the south-east corner of said lot." This deed clearly conveys the land in dispute, unless it be contracted by the exception. But *Stephens's* two hundred acres in the north-east corner, and the other two hundred and forty acres, can all be located, without any violent construction, so as not to touch the creeks, mills, or possessions of the defendant. In a case in which the location of the two hundred acres is so extremely vague, this ought to be done, because the possessions taken at the time are to be considered as a practical location, by the mutual consent of the parties. It is an old principle of law, that exceptions in a deed, and every uncertainty, are to be taken favorably for the grantees. (*Co. Litt.* 183. a. 9 *East*, 15. 3 *Johns. Rep.* 387.) Now it appears that *Mulhollen* took possession, immediately, under his deed, and that exclusive possession has been had, and valuable improvements made, under that deed, on the lands in question, and that *Wood*, and those under him, have never possessed westerly of the creek, and of *Stephens's* two hundred acres. He ought, then, at this day, to be restrained from setting up any new location, not absolutely necessary to give him his quantity of land, and which invades the possession of the defendant. *Mulhollen's* deed shows that the title to such possession is out of the lessors of the plaintiff. Judgment ought, therefore, to be rendered for the defendant.

NEW-YORK.  
October, 1811

JACKSON  
v.  
GARDNER

Judgment accordingly.  
811

NEW-YORK,  
October, 1811.

IRWIN  
v.  
CARYELL.

\*IRWIN against CARYELL.

Where a person who is *security* for the defendant, in an action before a justice, is a material witness for the defendant, he ought to be discharged, and new security taken, so that the defendant may have the benefit of his testimony.

(a)

IN error, on *certiorari*, from a justice's court. *Caryell* sued *Irwin* for work and labor performed for him. The defendant pleaded *non assumpsit* and a set off. The trial was postponed, at the instance of *Irwin*, and security given. At the trial, the defendant called the security as a *witness*, and prayed that he might be discharged as security, and another person, then offered, be taken in his stead; but the motion was denied, and the witness rejected. The jury found a verdict for the plaintiff, on which the justice gave judgment.

*Per Curiam.* The justice ought to have released the bail, by taking the other security offered. It would be unreasonable and unjust to deprive the party of the benefit of a material witness, when his interest can be thus discharged, without injury to the other party. Sound and legal discretion require that it should be done. It is the practice for the court to discharge the bail upon application, when he is wanted as a witness for the defendant. (Sty. 285.)

Judgment reversed.

(a) *Ace. Leggett v. Boyd*, 3 Wendell, 376.

NEW-YORK  
October, 1811BUSH  
v.  
BARNARD.

## BUSH against BARNARD.

THIS was an act of *assumpsit*, on two promissory notes, made by the defendant, dated at *Boylston*, in the state of *Massachusetts*, the first *March*, 1794, each for twenty pounds, the one payable on demand, the other in six \*years. The defendant pleaded the general issue, and the statute of limitations.

The cause was tried before Mr. Justice *Van Ness*, at the *Oneida* circuit, in *June* last.

The notes being proved, the plaintiff, in order to show an acknowledgment of the debt, offered to prove that a short time before the commencement of the suit, the defendant, in conversation with the plaintiff, in relation to an adjustment or compromise of the plaintiff's demand, offered to pay him the amount of the note in specific articles. But it appearing that the witness offered had heard nothing between the parties, except what passed in a *treaty for a compromise*, the judge, on the objection of the defendant's counsel, rejected the testimony, and the plaintiff submitted to a nonsuit.

A motion was made to set aside the nonsuit, and for a new trial.

*Lynch*, for the plaintiff.

*Gold*, contra.

*Per Curiam.* The promise which was offered to be proved was a conditional promise; and the plaintiff was bound to show that he had offered, and was ready to accept, the specific articles. In the case of *Davis v. Smith*, (4 *Esp. N. P. Cases*, 36,) it was ruled that a promise to pay a debt, barred by the statute of limitations, *when able*, was a conditional promise, and the plaintiff was bound to show that the defendant was of sufficient ability to pay the debt. This case comes within the principle of that decision, and the court deny the motion on that ground, without touching the point raised at the trial.

Motion denied.

Where *A* promised to pay a debt barred by the statute of limitations, in certain specific articles, it was held, that the promise was conditional, and that the plaintiff was bound to show that he offered, and was ready to accept, the specific articles.  
(a)

(a) *Vide Scanton v. Eizlord*, 7 *Johns. Rep.* 36. *Wait v. Morris*, 6 *Wendell*, 394.

NEW-YORK,  
October, 1811.

PEASE  
v.  
GLEASON.

Where a justice, after a suit was commenced, moved into a part of a house where a tavern was kept, and there tried the cause, while the tavern was kept in the other part of the house; held, that the justice, under the twentieth section of the act, (24th sess. c. 165,) had no jurisdiction; and his judgment was reversed. (a)

*IN error, on certiorari, from a justice's court.*  
*Low* sued *Rice* before the justice. There was a trial by jury, and a verdict for the defendant. Before the trial, the justice moved into the house of one *Morse*, who kept a tavern. He occupied one end of the house, but the whole communicated, in the inside, by a passage, and *Morse* continued keeping tavern at the time of the trial.

*Per Curiam.* The justice, at the time of the trial and judgment, lived in a house in which a tavern was kept, and he had no jurisdiction; for the statute (*seas. 24. c. 165. s. 20.* [Vide 2 R. S. 226. s. 6]) says, that no such justice "shall try any cause by virtue of this act." To say that living as he did was not living in a house where a tavern was kept, would be to repeal the law, by allowing it to be evaded, on the most flimsy pretexts. The justice moved into the house after the suit was commenced, and before the trial. The plaintiff's appearing and going to trial, will not give jurisdiction where there was none by law.

Judgment reversed.

(a) *Clayton v. Per. Dux.* 13 Johns Rep. 218. *Colvin v. Luther*, 9 Cowen, 61. *Striker v. Mott*, 6 Wendell, 465.

### PEASE against GLEASON.

Where a justice has a discretion, as to adjourning a cause, nothing but an abuse of such discretion will be regarded as error.

[\* 410]

*IN error, on certiorari, from a justice's court.*  
*Gleason* sued *Pease* in an action of trespass. There was a trial by jury, and a verdict for the plaintiff for eleven dollars and eight cents, on which the justice gave judgment.

On the return to the *certiorari*, the objection was, that the justice, on affidavit of *Gleason*, adjourned the cause for two hours, after the jury were balloted, to enable \*the plaintiff to procure witnesses; and he admitted an attorney to act for the plaintiff, on proof of his absence from the county.

*Per Curiam.* The adjournment was no serious inconvenience, and it rested in the discretion of the justice, which was not abused in this case. There is no evidence of it. The proof of the absence of the party satisfied the justice, and that was sufficient.

Judgment affirmed.

NEW-YORK,  
October, 1811.JAMES  
v.  
WALRUTH.

## JAMES against WALRUTH.

THIS was an action of *debt* on an *award*. The declaration, after setting forth the penalty of the bond, counted on the condition, submission and award. After stating the submission of all controversies, &c. between the parties, to three arbitrators, and to abide the award of them, or any two of them, &c. "then the obligation to be void, or otherwise to remain in full force and virtue," it proceeded, "and whereas, there was also a suit depending," &c. "against the plaintiff, in favor of *David Fisk*, &c. the said arbitrators were also to take the said suit into consideration and award," &c. (setting forth the award, &c.) The defendant pleaded no such award, on which issue was joined. The *case* set forth the declaration, bond and condition and *award*; and it appeared that the declaration served on the defendant's attorney differed from that contained in the *nisi prius* record, as to the amount awarded; and that the suit of *David Fisk*, \*against *James* was also included in the condition of the bond of submission. The defendant's counsel objected to the variance, at the trial. It was admitted, that true copies of the bond and award had been served on the defendant, with the declaration; and a verdict was taken for the plaintiff, subject to the opinion of the court, on a case agreed upon by the parties.

*Cady*, for the plaintiff.

*Gold*, contra.

*Per Curiam.* The case does not profess to state the testimony given at the trial. It is impossible to discover, from this very defective case, what point was intended to be reserved for the opinion of this court, except it be the question touching the variance between the declaration, as contained in the *N. P.* record, and the declaration, as served upon the defendant's attorney. But as true copies of the bond and award are admitted to have been served, and as the *N. P.* record and the proof corresponded, and as the defendant, instead of demurring specially, for the variance between the award as set forth in the declaration, and the *oyer*, (which

In an action of *debt* on an *award*, true copies of the bond and *award* were served, with the declaration on the defendant's attorney; but the *award* set forth in the declaration, varied from the *oyer*, and from that contained in the *nisi prius* record. The defendant pleaded no such *award*, and a verdict was found for the plaintiff.

It was held, [\* 411] that if the defendant meant to avail himself of the variance between the *award* set forth in the declaration and the *oyer*, he should have demurred specially, instead of pleading no *award*; and that, as the proof corresponded with the *nisi prius* record, at the trial, the defendant was too late to take advantage of the variance, nor could the verdict be set aside, on the ground of surprise, as the *oyer* contained a true copy of the *award* (a)

(a) Where the *oyer* varies from the instrument declared on, the defendant may set it forth in his plea and demur, or he may, without setting it forth, plead *non est factum*, and avail himself of the variance on the trial. *Ehle v. Purdy*, 6 *Wendell*, 629. *Vide Henry v. Brown*, 19 *Janes. Rep.* 49. *Every v. Mervin*, 6 *Cover*, 300.

NEW-YORK,  
October, 1811.

Overseers of  
NISKAYUNA  
v.  
Overseers of  
GUILDER-  
LAND.

[\* 412]

ought to have been the course; 1 *Ld. Raym.* 715. 1 *Salk.* 73,) pleaded no award, he comes too late to take advantage of the variance. Every thing appeared correct, at the circuit. The judge could only apply the testimony to the pleadings as they were contained in the record. There was no surprise upon the defendant, as there might have been, if the declaration and *oyer* served had both contained the same mistake; nor is this a motion to set aside the proceedings at the circuit, on the ground of any such surprise. After pleading in chief, and going to trial upon the merits, the defendant now attempts to take advantage of a mere clerical mistake in the declaration which could not have deceived him; for not only was the *oyer* correct, \*but the true sum awarded was mentioned, in two different places, in the same declaration.

There might have been a question whether the plaintiff was entitled to recover for the costs of the two suits mentioned in the award; but as the amount of the verdict is not stated, it cannot be discovered, from the case, whether the costs were included in the verdict, and no question on that point was raised at the trial.

Judgment for the plaintiff

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The Overseers of the Poor of the Town of NISKAYUNA  
against The Overseers of GUILDERLAND.

An order of two justices of *A.* for the removal of a pauper, directed the constable to convey and transport him to the town of *W.* being the place from whence he last came, and there deliver him to a constable of *W.* who was required also to deliver him to the next constable; and so from constable to constable, until the pauper should be transported to the place of his last legal settlement, if any he had, in the state.

The pauper was delivered to a constable of *W.* who transported and delivered him to a constable of *N.* The overseers of *N.* appealed to the general sessions from the order, who dismissed the appeal. It was held, that the order had no force beyond the town of *W.* to which the pauper was first sent; and as to every other place or purpose, was void, for uncertainty; and that *N.* not being bound by such an order to receive the pauper, had no right of appeal, having acted in their own wrong.

Where paupers are to be sent out of the state, by virtue of the 7th section of the act, (sess. 24. c. 184,) the justices in their order of removal, must designate the route by which the pauper is to be transported, and not leave it to the discretion of constables, who are mere ministerial officers; who cannot be allowed to take the pauper where they please, in search of his place of last legal settlement. (a)

(a) *Vide 1 Rev. Stat. 623, sec. 31*

by the overseers of the poor of *Niskayuna*, against the overseers of *Guilderland*, from an order of removal made by two justices of *Albany* county, residing in *Guilderland*, whereby *Jacob Clute and his wife* were removed to *Niskayuna*, was heard. The *order appealed from* was dated the second *March*, 1810, under the hands and seals of the justices, and stated (upon the information of the overseers of the poor of the town of *Guilderland*) that *Clute* and wife had come to reside in \*that town, not having obtained a legal settlement therein, nor produced any certificate of their settlement elsewhere, and that they were likely to become chargeable, &c. that the justices, upon due proof made thereof, and on the examination of the said *Clute* and his wife, upon oath, adjudged the facts, as stated, to be true; and that upon such examination and proof, not being able to discover where was the last place of legal settlement of the said *Clute* and wife, but that *Clute* was born, and had once been legally settled in *Niskayuna*, and that he had lived a number of years in the town of *Watervliet*, in the county of *Albany*, but whether he had gained a legal settlement in that town, they could not discover, but they had discovered, upon examination and proof upon oath, and therefore adjudged, that the said *Clute* came last from the town of *Watervliet*, and that he married his wife in the said town of *Guilderland*. And they, having been ordered, by a certain day then past, to remove to the place of their former settlement, and having neglected and refused to do so, the justices directed and commanded the constable "to convey and transport *Clute* and his wife to the town of *Watervliet*, being the town from whence they last came, and to deliver them at the house of a constable of that town, who was also required to receive them, and convey them to the next constable, and so, from constable to constable, until they should be transported to their last place of legal settlement, if such can be found in this state."

It was admitted, that *Watervliet*, to which town the paupers were removed, had sent them with the order to *Niskayuna*.

A preliminary objection was made by the respondents, before the Court of Sessions, that, as the order did not remove the paupers to *Niskayuna*, nor make any adjudication, that that town was the last place of their legal settlement, the overseers of *Watervliet* only, and not those of *Niskayuna*, could sustain an *appeal* from the \*order, if any could be sustained. Upon hearing the counsel on both sides, the Court of Sessions determined, that the preliminary objection was well taken, and, therefore, dismissed the appeal.

*Parker*, after reading the return, contended, that sufficient cause was shown against granting a *mandamus*. It appeared,

NEW-YORK,  
October, 1811

Overseers of  
*Niskayuna*

v.  
Overseers of  
*Guilder-  
land*.

[ \* 413 ]

[ \* 414 ]

NEW-YORK,  
October, 1811.

Overseers of  
NISKAYUNA  
v.  
Overseers of  
GUILDFER-  
LAND

he said, that the sessions had adjudicated. If the sessions had a right to decide, and had decided wrong, a *mandamus* was not the proper remedy; but the proceedings should be brought to this court, by *certiorari*. (1 *Johns. Rep.* 54. 339. 2 *Johns. Rep.* 105. 3 *Johns. Rep.* 23. 6 *Johns. Rep.* 92.) The superior courts will not, in the summary way of a *mandamus*, look into the proceedings of an inferior court. (1 *Burr. Sett. Cas.* No. 263. p. 844.) If the merits of the order and adjudication are to be inquired into, it should be when the whole proceedings are brought up by *certiorari*.

[Here he was stopped by the court, who desired to hear the other side.]

*I. B. Yates*, contra. The Court of Sessions made no adjudication. They did not hear or decide on the appeal, but dismissed it, on a preliminary objection, as to the right of appeal. A *mandamus*, therefore, is the proper remedy. It is a command from the higher court to an inferior court, directing them to do some particular thing which they ought to do. (3 *Bl. Com.* 110.) In all the cases cited from the reports of the decisions of this court, the court below had heard and decided on the merits. The principle of the *English* decisions (2 *Burr. Sett. Cases*, 32. 844. 5 *Term Rep.* 477) is perfectly analogous.

[ \*415 ]

*Parker* said, that the cases cited were those in which the court refused to hear an appeal. Here the sessions decided, that this was not a proper case for an appeal. It was a *travelling* order, but if there was a right of an appeal from this order, it belonged to *Watervliet*, not *Niskayuna*. But, admitting that this court will now enter \*into the merits of the case, on this motion, he contended, that no appeal would lie from such an order. It is not an order of settlement. It adjudges no place to be chargeable with the support of the paupers. The only adjudication is, that they came last from *Watervliet*, and it orders them to be removed there. It is a *pass warrant*, issued pursuant to the directions of the seventh section of the act for the settlement and relief of the poor. (Sess. 24. c. 184.) The order does not adjudge that the last place of legal settlement was at *Niskayuna*; but merely states, that *Clute* was born, and once settled there. It is not an order of settlement, as to *Niskayuna*, unless there is an express adjudication, that that was the last place of his legal settlement. It is what, in *England*, is called a *vagrant pass*, from which no appeal lies. (Burr. Sett. Cases, No. 72. 74. 263. Cald. Cases, 18.) To allow appeals from such *passes* or orders, would produce manifold inconvenience and vexa

tion. There might be a hundred appeals from one order of removal. If *Niskayuna* has the right of appeal, every other town through which the pauper may be passed, would have the same right. If any appeal lies, it belongs to *Watervliet*, the town to which the paupers were ordered to be removed, by the overseers of *Guilderland*.

Again, the statute gives the right of appeal to the party aggrieved. Now *Niskayuna* could not be aggrieved by an order of *Guilderland* to remove a pauper to *Watervliet*. If *Watervliet* sent the paupers to *Niskayuna*, *Guilderland* is not responsible. If the overseers of *Guilderland* can be made answerable in this case, they would be equally so to all the different towns through which the pauper might have been sent to the remotest bounds of the state.

*I. B. Yates.* It is true, that in *England* the general rule is, that an *appeal* will not lie from a *vagrant pass*; but the *English* statutes relative to the establishment of the poor, will, on a comparison, be found, in many of the provisions, essentially different from our act. The seventeenth section of our act gives the right of appeal to "every person who shall think himself aggrieved by any judgment or order of any justice or justices of the peace, or by warrant of removal of any poor person." By the act, passed *March* thirty, 1810, (*sess. 33. c. 109. s. 4.*), on hearing of appeals, under the act relative to the settlement of paupers, the courts of general sessions are required to begin *de novo*.

[ \* 416 ]

No construction can be given to the act relative to the settlement of the poor, as to orders for a direct removal, which does not equally apply to orders for an indirect removal, or pass warrants. The statute makes no distinction between them, in regard to the right of appeal. Even in *England*, (*Burr. Sett. Cas. 105. 204. No. 72. 74. Ib. 18. 844.*), there are cases of appeals from *vagrant passes*.

Though the court do not directly decide the point, in the case of *The Overseers of Shawangunk v. The Overseers of Mamakating*, (1 *Johns. Rep. 54.*), yet it may be fairly inferred from the case, that it was their opinion that an appeal would lie from an order of removal; for the counsel made the distinction between the two kinds of orders, and the court decided on the merits of the case. So in the case of *The Overseers of Newburgh v. The Overseers of Plattekill*, (1 *Johns. Rep. 330.*), the counsel raised the objection that no appeal would lie from such an order; and the court decided on the merits, without taking notice of the objection as to the right of appeal, which they would not have done, had they supposed the objection well founded.

Then has any other town, except that to which the pauper

NEW-YORK  
October, 1811  
Overseers of  
NISKAYUNA  
v.  
Overseers of  
GUILDER-  
LAND.

NEW-YORK,  
October, 1811.

Overseers of  
NISKAYUNA  
v.  
Overseers of  
GUILDFIELD-  
LAND.

[ \* 417 ]

is first sent, if aggrieved, the right of appeal? There is no adjudication as to this point; and it must rest on a fair construction of the act. By the seventh section, the legislature had in view the removal of paupers who had no place of legal settlement in the state, and intended that the towns through which the pauper was to pass should be designated in the warrant. It could not be the intention of the legislature that the constable should take the pauper to any town he pleased.

\*The terms of the act, in regard to appeals, are broad. They are allowed to every person, or town, having a reasonable cause of complaint.

*Per Curiam.* The Overseers of *N.* show no merits to entitle them to the present motion. The order of the justices contained an adjudication, that the paupers last came from the town of *W.* and it ordered the constable to convey them thither, and there the order had spent itself. It did not designate any other place to which the paupers were to be removed, either within or without the state; and it would be equally absurd and oppressive, to suppose that it had any ulterior force, when it left every thing at large to constables, without any certainty, or order, or adjudication as to place or object. The order, as to every thing that was to be done after the paupers had been removed to *W.* was void, for uncertainty. Constables are mere ministerial officers. They cannot be roaming over the state with paupers, seeking for some place of settlement. If the pauper is to be sent out of the state, the order of the justices must, at least, prescribe the route. It ought not to be left to the discretion of constable upon constable. This would be repugnant to good order, to the humanity due to the unfortunate pauper, and to the spirit of the act which declares that the stranger shall be conveyed from constable to constable, "or otherwise as such justices shall direct." The justices must, therefore, make a special direction in the case, and here was none made. The town of *N.* was, therefore, not bound to receive the paupers, without a new order, and if that town did receive them, it was not by the authority of the order, but in their own wrong. The sessions were, therefore, correct, in deciding that the Overseers of *N.* had no right to appeal from the order.

Motion denied.

NEW-YORK,  
October, 1811ALDERMAN  
v.  
TIRRELL.\*ALDERMAN *against* TIRRELL.

IN error, on *certiorari*, from a justice's court.  
 Tirrell sued Alderman, by warrant for a trespass, in taking Leifer. The defendant pleaded that he was an *infant*, and lived with his father; which was not denied. The trespass was proved, and the defendant offered his father, as a witness, but the justice rejected him, as interested, on the ground that he was present and directed the defendant to take the heifer. The justice also refused to allow the father of the defendant to plead the cause for him, at the trial, which was on the thirteenth *April*, 1810, and a judgment was given for the plaintiff.

In a suit before a justice, an *infant* must appear by guardian. (a)

In an action of trespass for taking a heifer, the father of the defendant, and by whose order the trespass was committed, was held to be a competent witness for the defendant. (b)

*Per Curiam.* There were several errors in this case. 1. The defendant ought to have appeared by guardian. (2 *Johns. Rep.* 192.)

2. His father ought to have been permitted to plead for him, as the law, forbidding that privilege, had been repealed, on the fifth of the same month.

3. The father was a competent witness; for the son had no suit over against him, as a co-trespasser; nor for obeying his illegal order. The objection only went to his credit.

Judgment reversed.

(a) *Vide Ingersoll v. Wilson*, 3 *Johns. Rep.* 437.

(b) *Hasbrouck v. Lown*, *supra*, 377. *Cass v. Reeve*, 14 *Johns. Rep.* 79.

NEW-YORK,  
October, 1811.

BUSH

v.

SEABURY.

BUSH and others *against* SEABURY.

By the "Act to vest certain powers in the freeholders and inhabitants of the village of *Poughkeepsie*," passed the 8th April, 1801, (sess. 24. c. 182,) the trustees of the village have power to make a by-law to prevent the sale of meat, &c. for the consumption of the inhabitants, within certain prescribed limits, except at the public market place; and an action may be maintained by the trustees, to recover the penalty given for every offence against such by-law.

[\* 419]

IN error, on *certiorari*, from a justice's court. The plaintiffs in error, as trustees of the village of *Poughkeepsie*, \*brought an action of debt against the defendant, for five penalties or forfeitures, under the act of the legislature, entitled "An act to vest certain powers in the freeholders and inhabitants of the village of *Poughkeepsie*," passed the eighth April, 1801, (sess. 24. c. 182,) and a certain *by-law* of the corporation of the village of *Poughkeepsie*, entitled "A law to regulate the public market of the village of *Poughkeepsie*, and to prevent forestalling the same," passed June twelve, 1809. The defendant pleaded *nil debet*. There was a trial by jury.

The plaintiffs read in evidence the act of the legislature which declares, "That it shall be lawful for the trustees of the said village, or the major part of them, and their successors, to make, ordain and publish such prudential by-laws, rules and regulations, as they, from time to time, shall deem meet and proper, and such in particular, as are relative to public markets within the said village, and relative to streets," &c. "and relative to any thing whatsoever that may concern the public and good government of the said village; but no such by-laws shall extend to the regulating or ascertaining the prices of any commodities or articles of provision, except the article of bread, that may be offered for sale." (s. 3.) They also read the by-law of the corporation, by the second section of which it was ordained, that after the first July, no person or persons should, within certain limits, particularly set forth, and described, "hawk about any kind of beef, pork, veal, mutton, or any other kind of meat by selling the same for the consumption of the inhabitants, and that any person wishing to sell the same, for the purpose aforesaid, shall repair to the public market-house, and there expose the same for sale," &c. under the penalty of five dollars for every offence.

Three offences, by the defendant, in selling meat, out of his wagon, within the limits mentioned in the by-law, were proved. The justice charged the jury, that the trustees of the village of *Poughkeepsie* had no power to \*pass such a by-law, and that the same was illegal and void; and further, that the plaintiffs could not recover in this action more than a single penalty. The jury found a verdict for the defendant.

[\* 420]

*Ruggles*, for the plaintiffs in error.

*Oakley*, contra.

*Per Curiam.* The act incorporating the village of *Poughkeepsie*, authorizes the trustees to make by-laws, "relative to public markets within the said village, &c. and relative to any thing whatsoever that may concern the public and good government of the said village, but no such by-laws shall extend to the regulating or ascertaining the prices of any commodities or articles of provision, except the article of bread, that may be offered for sale." Without this special exception, it would seem that even the regulation of the price of provisions might, in the opinion of the legislature, have been included under the general authority contained in this provision. The fixing the *place* and times at which markets shall be held and kept open, and the prohibition to sell at other places and times, is among the most ordinary regulations of a city or town police, and would naturally be included in the general power to pass laws relative to the public markets. If the corporation had not the power in question, it is difficult to see what useful purpose could be effected, or what object was intended, by the grant of the power to pass laws "relative to the public markets." The mere regulation of the building and of the stalls of those who might choose to go there, instead of elsewhere, to sell their market provision, would be an idle and useless power, and of no moment towards the good government of the village. Extravagant cases may be stated of the abuse of the power, as by an ordinance to regulate \*the sale of wheat, &c. but this is not a logical way to test the existence of the power.

There was no objection taken in the court below to the manner in which the corporation sued, nor as to the place where the offences were proved to have been committed. The declaration was by the plaintiffs, in their corporate style, and we must intend that they duly appeared, and that the sales by the defendant were within the prescribed limits, and that the verdict was founded on the charge of the justice that the by-law was illegal and void. That charge being erroneous, the verdict was also wrong, and the judgment must be reversed.

Judgment reversed.

NEW-YORK,  
October, 1811.

BUSH  
v.  
SEABURY.

[ \*421 ]

NEW-YORK,  
October, 1811.

CLARK  
v.  
Foot.

CLARK against Foot.

If *A.* sets fire to his own fallow ground, as he may lawfully do, which communicates to and fires the woodland of *B.*, his neighbor, no action lies against *A.* unless there was some negligence or misconduct in him or his servants.

(a)

IN error, on *certiorari*, from a justice's court. *Clark* sued *Foot* before the justice, to recover damages sustained by reason of *Foot's* setting fire to the plaintiff's woods.

The cause was tried by a jury. A witness testified that he set fire, by the direction of the defendant, to certain fallow ground, belonging to the defendant, which fire run into the woodlands of the plaintiff; that he told the defendant of it, who tried only to prevent the fire from burning his own farm. The fire burnt during six or seven days, on the pine hill of the plaintiff, and damaged his woodland to the amount of sixty dollars.

The return stated that the defendant produced a number of witnesses, who testified nothing contradicting the materiality of the above evidence, and that the jury found a verdict for the defendant, on which the justice gave judgment.

[\*422]

\**Per Curiam.* The point to be tried was, whether there was negligence on the part of *Foot*, or his agent; for *Foot* was as much accountable for the negligence of his servant, whilst employed in his business, as if the fire had spread by his own neglect.

It is a lawful act for a person to burn his fallow; and if his neighbor is injured thereby, he will have a remedy, by action on the case, if there be sufficient ground to impute the act to the negligence or misconduct of the defendant or his servants.

Should a man's house get on fire, without his neglect, or default, and burn his neighbor's, no action would lie against him, notwithstanding the fire originated in his house, because it was lawful for him to keep fire there. (3 *Bl. Comm.* 43. 1 *Noy's Max.* c. 44.) The same rule would apply to this case.

Here there is no evidence of negligence, and the jury have passed on the case.

Judgment affirmed.

(a) *Vide Pearson v. Holland*, 17 *Johns. Rep.* 92. *Livingston v. Adams*, 9 *Crown*, 175.

NEW-YORK,  
October, 1811.JACKSON  
v.  
HARTWELLJACKSON, *ex dem.* LYNCH, *against* HARTWELL.

THIS was an action of ejectment, brought to recover the possession of a school-house, in the village of *Lynchville*. The cause was tried at the *Oneida* circuit, in *June* last, before Mr. Justice *Van Ness*.

The plaintiff gave in evidence a deed, dated the twenty-first *\*May*, 1800, from *Dominick Lynch* to the supervisors of the county of *Oneida*, which recited, that by an act of the legislature, passed the fifteenth *March*, 1798, the said supervisors were authorised, and had agreed and determined, to erect and build a court-house and gaol in the town of *Rome*, in and for the county of *Oneida*; and that the lessor was owner of a certain tract of land, situate in the town of *Rome*, in the village called *Lynchville*, and the supervisors had agreed upon the lots or pieces of land thereafter conveyed to them, as a suitable site for the said court-house and gaol; therefore, the plaintiff, in order to promote the settlement and embellishment of *Lynchville*, and in consideration of one dollar, granted to the said supervisors, certain lots of land therein described, to have and to hold the same to the said supervisors, and to their successors in office, and their own proper use and behoof for ever; upon the special trust and confidence, nevertheless, that the said supervisors and their successors should, without delay, erect and complete a court-house and gaol upon part of the premises so granted to them, and allotted for that purpose; and that the said supervisors and their successors in office, shall and will, at all times, for ever thereafter, permit and suffer all that part of the granted premises, situate west of a certain street called *James* street, to be laid out and appropriated for the building and erecting a church and school-house thereon, which church and school-house shall be established and built according to the direction and appointment of a majority of the freeholders, being inhabitants of the town of *Rome*, for the time being, for the use, benefit and advantage of all the inhabitants of the town of *Rome*; and that the said supervisors and their successors in office, should, for ever thereafter, permit and suffer all that part of the premises thereby granted, situate east of *James* street, to be laid out and appropriated for the purpose of erecting the court-house and gaol; and also that they shall,

bequestable, whether prior to the act passed 8th *April*, 1801, (*see s. 24. c. 180*), they were competent to take a grant of land. (a)

(a) *Vide 1 R. S. 364, sec. 3. Jackson v. Cory, sup. 386. Hornbeck v. Westbrook, 9 Johns Rep. 73. North-Hempstead v. Hempstead, 2 Wendell, 109*

*A.* granted to the supervisors of the county of *Oneida*, a parcel of land, upon trust, that they should

[ \* 423 ]

erect and build on one part of it, lying east of a certain street, a court-house and gaol, and that they should suffer that part lying west of the same street, to be appropriated for building a church and school-house for the use of the inhabitants of *Rome*. It was held that if the supervisors of the county were a corporation, they had no capacity to take and hold lands, as supervisors, for the use of the inhabitants of *Rome*, or for any other use or purpose than that of the county which they represented.

Even a regular corporation aggregate, cannot be seized of land, in trust, for purposes foreign to its institution. The supervisors of a county are a corporation with special powers, and for special purposes only; and it

is very questionable, whether, prior to the act passed 8th *April*, 1801, (*see s. 24. c. 180*), they were competent to

NEW-YORK,  
October, 1811.

JACKSON  
v.  
HARTWELL.

at all times thereafter, for ever permit and suffer \*the whole piece or parcel of land and premises thereby granted, and every part thereof, to be and remain a public square; and provided, also, that the said supervisors and their successors in office, shall not, at any time thereafter, build or suffer to be built, or erected, upon any part of the premises thereby granted, any dwelling-house, edifice, or building, upon any pretence whatever, within fifty feet of any part of the boundary line of the premises, &c.

The plaintiff then offered to prove, that the school-house was originally built on the west side of *James* street, on a line with the church, court-house, and gaol, and agreeably to the original plan, agreed on and adopted by the parties, and contributed much to the ornament of the village; that some time before the commencement of this suit, the lessor sold a lot to *H. Huntington*, on the north side of the square, and that he and others removed the school-house to the opposite side of the square, so as to be distant seventy feet from a corner lot of the lessor, on the south side of the square, and materially to injure the value of the lot, and destroy the beauty and symmetry of the public square, although the lessor opposed and forbade the removal of the school-house; and that the removal was made without any vote or resolution of a majority of the freeholders or inhabitants of the town of *Rome*. This testimony was overruled by the judge, and a verdict was taken, by consent, for the plaintiff, subject to the opinion of the court on a case containing the above facts.

*Platt and Lynch*, for the plaintiff.

*Clark and Gold*, contra.

*Per Curiam.* The grant from *Lynch* to the supervisors of the county of *Oneida*, was for several purposes. That part of the land which lay east of *James* street was \*granted to them for the use of the county, for the erection and accommodation of a court-house and gaol, and that part of the land which lay west of the said street (and which includes the school-house or premises in question) was granted for a church and school-house, "for the use, benefit, and advantage of the inhabitants of the town of *Rome*." Admitting the grant of the first parcel of land to have been valid, prior to the act of 1801, it does not follow that the grant of the second parcel, for a different use, was valid. If the supervisors were a corporation, it was only for certain special purposes, declared by the act of the seventh *March*, 1788. They certainly had no capacity to take and hold lands, as supervisors, for any other use or purpose than that of the county which they repre-

[ \* 425 ]

sentent. They were not competent to be seised as trustees for the use of an individual, or of the inhabitants of a village. Even a regular corporation aggregate, with its usual plenary powers, could not be so seised, for it would be foreign to the purpose of its institution, and the trust could not be duly enforced. (1 *Plowd.* 103. 1 *Kyd on Corporations*, 72.) The supervisors of a county are a corporation for special purposes, and with special powers only; and it is very questionable, whether, before the act of 1801, (*Laws*, vol. 1. p. 561,) they were competent to take a grant of land. There are many instances, in the law, of collective bodies of men, coming under one general description, endowed with a corporate capacity in some particulars expressed, but who have, in no other respect, the capacities incident to a corporation. Thus, in *England*, under the statute of *Winchester*, the hundred can be sued in its collective capacity. So church-wardens may take goods, and bring actions of trespass, but a feoffment to them would be void, for they have no capacity for such a purpose. Numerous examples, of the like kind, are mentioned or referred to by Mr. *Kyd*, in the introductory chapter to his Treatise on Corporations. (*Kyd on Corp.* vol. 1. p. 9, \*10. 12. 29. 31.) Our laws are full of instances of persons clothed with corporate powers, for certain special purposes. The loan-officers of a county are a corporation; and could they, as such, receive a grant of land for the use of a town, or of a church? Certainly not. Nor can the supervisors of *Oneida* take a grant of land, for the use of the town of *Rome*. Such a grant must be deemed void, upon every principle, whether we consider the special and defined objects of a corporate capacity in the board of supervisors; whether we consider the power given them by statute, to take conveyances of land *for the use of the county*; or, lastly, whether we refer to the incapacity of all corporations, to hold lands in trust, for any other object than that for which the corporation was created.

Whether the Court of Equity would, or would not, prevent the trust, as to the inhabitants of *Rome*, from failing for want of a trustee, is a question not for this court to decide. It is enough in this case, that a court of law cannot supply the want of a sufficient grantee. We are of opinion, that judgment must be rendered for the plaintiff.

NEW-YORK,  
October, 1811.

JACKSON  
v.  
HARTWELL.

[ \*426 ]

Judgment for the plaintiff.

327

NEW-YORK,  
October, 1811.

Rose  
v.  
STUYVESANT.

Rose against STUYVESANT

The discretion given to a justice, by the 31<sup>st</sup> section of the act, sess. 31. c. 204, to adjourn a cause, is not an arbitrary discretion; but ought to be soundly and judiciously exer-

[\* 427]  
cised. (a)

IN error, on *certiorari*, from a justice's court. *Stuyvesant* sued *Rose* before the justice. The first process was a *summons*, which was returned as personally served by reading. The plaintiff appeared on the return day, at the time and place appointed, and exhibited his demand. The return to the *certiorari* stated, that, previous to this, on the morning of the day on which the parties were to appear, *Rose* applied in writing, for an adjournment, on account of his child being dangerously sick. That the justice returned an answer that he wished further satisfaction on the subject, and unless it was received, he would proceed at the hour, to try the cause. On the same day, and before the parties were called, *Rose's* father appeared in his behalf, to get the trial adjourned; but the plaintiff below would not consent. The parties were called. *Rose's* father answered for him, and prayed an adjournment, and was told by the justice, that the issue must first be joined. The plaintiff declared, and *Rose's* father being asked, whether he should plead, he declared his ignorance of the law, and want of instruction how to plead, and that he wanted an adjournment. He was sworn to testify to the occasion of *Rose's* absence, and said that *Rose's* child was dangerously sick; but an adjournment was refused. *Rose* lived two miles from the place of trial. It appeared that *Rose's* father had no authority in writing to appear, and he did not offer to make any defence.

A judgment was given for *Stuyvesant*.

*Per Curiam.* The only point is about the regularity of refusing the adjournment. Another point was made, that the justice refused to admit the father to defend; but the return does not justify this objection.

Under the second section of the act, the justice had a discretion, on the non-appearance of the defendant below, to put off the hearing of the cause, to such reasonable time, as he should appoint, not exceeding six days. (Sess. 31. c. 204 [2 R. S. 238. s. 67.])

This discretion is not an arbitrary one: it ought to be soundly and judiciously exercised. The situation of *Rose's* child was such as ought to have induced the justice to put off the trial. We are of opinion, therefore, that the judgment ought to be reversed.

Judgment reversed.

(a) *Vide Brill v. Lord*, 14 Johns. Rep. 341.

NEW-YORK,  
October, 1811Trustees of  
LANSINGBURG  
v.  
WILLARD.\*The Trustees of LANSINGBURG *against* WILLARD.IN error, on *certiorari*, from a justice's court.

The plaintiffs in error brought an action, before the justice, against the defendant, to recover certain penalties incurred by violating a by-law of the village of *Lansingburg*, in releasing and rescuing certain geese from the pound, and from persons driving them to pound.

The defendant pleaded not guilty, and there was a trial by jury.

*Reuben Willard* was called as a witness by the plaintiffs, and being challenged, on his *voire dire*, answered, that he was interested in the event of the cause; and, to explain how he was interested, said, that a long time before this suit, he had agreed with his brother, the defendant, to support their mother, should she ever come to want: that the geese released belonged to her, from which circumstance, he considered himself interested in the event of the suit.

The plaintiffs urged that he might be sworn, on the ground that he was interested against them, if at all. But the justice rejected the witness; and the jury found a verdict for the defendant, on which the justice gave judgment.

*Per Curiam.* There existed no possible interest in this case. It was merely ideal, if not an artifice to avoid giving evidence. The supposed interest was against the party insisting on the examination of the witness.

*Peake* (156) seems to think that an interest existing merely in the imagination of a witness, is not sufficient to reject him. But there are several cases (1 *Str.* 129. 12 *Vin.* 11. pl. 28) in which it has been held, that if a witness apprehends himself to be interested, though *stricto jure* he is not, he cannot be sworn.

\*To prevent fraud and trick, the following appears to be a salutary distinction. If a witness be called, and declares himself interested on the side of the party who calls him, and his interest be so circumstanced, that he cannot be released by the party calling him, in such case he ought not to be sworn, though in strictness he is not interested; but if his ideal interest be against the party calling him, and will run the risk of the bias on the mind of the witness, then he ought to be sworn.

We are at liberty to establish this rule without innovating

(a) *Vide Woods v. Williams*, 9 *Johns. Rep.* 123. *Gilpin v. Vincent*, *Id.* 219. *Williams v. Mathews*, 3 *Coven.*, 252. *Hurd v. West*, 7 *Coven.*, 752. *Moore v. Hitchcock*, 4 *Wendell*, 292.

NEW-YORK, on the law. The witness, in the present case, ought to have been admitted, and the judgment, on that ground, is reversed.

JACKSON  
v.  
M'KEE.

Judgment reversed.

JACKSON, *ex dem.* CORNELIUS and others, *against*  
M'KEE.

In cases of awards by the Onondaga commissioners, infants and others, under legal disabilities, at the time of the award, must file their dissent within three years after coming of age, or the removal of the disability, otherwise, they will be barred. (a) It is not sufficient to bring an ac-

[\* 430] tion within the three years, without having filed a dissent.

Whether the land was vacant, or not, the dissent is equally necessary, in every case. (b)

THIS was an action of ejectment, brought to recover the possession of lot No. 36, in the township of *Dryden*, in the county of *Cayuga*. The cause was tried at the *Cayuga* circuit, in *June* last, before Mr. Justice *Yates*.

The plaintiff gave in evidence a patent dated the seventh *July*, 1790, to *John Cornelius*, for the lot in question; a deed from *Henry Hart*, dated seventeenth *January*, 1784. The present suit was commenced the fifth *September*, 1808. No improvements were made on the lot prior to *August*, 1808.

The defendant gave in evidence an award of the *Onondaga* commissioners, the seventeenth *December*, 1799, by which they awarded the said lot to *John Patterson*, and *William J. Vredenburgh*. It was proved that the defendant was in possession under *Vredenburgh*, a few days before the commencement of the suit. It was admitted \*that no dissent was entered. It appeared that *Harman Visger Hart*, one of the lessors, was an infant when the award was made, and that the present suit was brought within three years after he came of age. The judge ruled that it was not necessary to show a dissent, and the jury, under his direction, found a verdict for the plaintiff.

A motion was made to set aside the verdict, for the misdirection of the judge.

*Cady*, for the defendant, contended, that, by the *act to settle disputes concerning the title to lands in the county of Onondaga*, passed the twenty-fourth *March*, 1797, (sess. 20. c. 51,) it was indispensable that a dissent should be filed, and a suit commenced within three years thereafter. The eighth section of the act provides for the rights of infants and others, under legal disabilities, and that nothing shall prejudice their rights, "if such infants shall, within three years after coming of age, make their dissent, and bring their suit and prosecute the same to effect."

*Van Vechten*, contra. In *Jackson v. Huntley*, (5 Johns.

(a) *Jackson v. Lewis*, 13 Johns. Rep. 504. S. C. 17 Johns. Rep. 475.

(b) *Jackson v. Stewartout*, *infra*, 490.

*Rep. 65.*) it was decided, that the act did not apply to the case of vacant lands. To render an award operative, the party in whose favor it is made, must take possession; and that possession must be followed by an action. The award could not operate against persons under legal disabilities. The award merely does not constitute the bar; but possession must be taken within a reasonable time, at least within two years, and continue during three years thereafter, to make a complete bar. This being a statute bar, is to be taken strictly. In the present case, the suit was commenced, as soon as practicable, within a few days after possession was taken by the defendant.

NEW-YORK,  
October, 1811.

JACKSON  
v.  
M'KEE

*Per Curiam.* The lessor of the plaintiff, *Hart*, in whom the title resided, was an infant when the award \*was made, and he has brought his suit within three years after he came of age, but it does not appear that he has filed his dissent to the award. The act relative to the *Onondaga* titles required all persons against whom an award might be made, to enter their dissent within two years and bring their suit within three years, or they should be barred. But the statute saved the rights of infants, if, within three years after coming of age, they "make their dissent and bring their suit and prosecute the same to effect as aforesaid." (*Laws*, vol. 2. 269.) The lessor has brought his suit within the time; but he has filed no dissent; and this dissent was an act of solemnity to be put upon record, and which the statute has required in every case, as indispensable, if the party meant to controvert the award. If the land was wild and unreclaimed, without any possession, the act did not conclude the party who had not brought his ejectment within the three years, because the object of the act could not be answered by a suit in such a case. This was the decision in *Jackson v. Hantly*. (5 *Johns. Rep.* 65.) But the court did not say that the dissent must not be entered within the time limited; nor is there any objection in such a case to the provision requiring the dissent. The reason and the utility of the dissent does not depend upon the fact of the land being at the time occupied or not. The dissent is necessary in every case; and as there was none in this case, the plaintiff was barred, and the motion to set aside the verdict must be granted, with costs to abide the event of the suit.

[ \* 431 ]

Motion granted.

331

NEW-YORK,  
October, 1811

PUTNAM  
v.  
WYLEY.

A person cannot maintain *trespass* for goods, unless he has actual or *constructive* possession at the time. He must have, at least, such a right as to be entitled to reduce the goods to his possession when he pleases. (a)

Where *A.* delivered to *B.* a number of cows and sheep, which *B.* promised to redeliver, within one year, with the natural increase, and to pay for such as should be lost or destroyed, and not redelivered; this was held a *lettинг* of the chattels, for a year, for a valuable consideration, and not a naked bailment; and that *A.* could not maintain *trespass* against a person

[\* 433]

who took them out of the possession of *B.*

\*PUTNAM against WYLEY.

THIS was an action of *trespass*, for taking four cows and twenty-one sheep, the property of the plaintiff. The cause was tried, at the last *Oneida* circuit, before Mr. Justice *Van Ness*.

The plaintiff produced a record of a judgment in his favor, against one *Simpson*, in *February*, 1808, and a *fieri facias*, for three hundred dollars, afterwards issued on the same judgment, and delivered to the defendant, as *deputy sheriff*, the second *March*, 1809, and a bill of sale, executed by the defendant as *deputy sheriff*, to the plaintiff, for sundry articles including the property in question, dated the twenty-ninth *April*, 1809, the plaintiff having purchased the same, at the sheriff's sale, for one hundred and fifty-eight dollars and seventy-five cents. The plaintiff also gave in evidence a receipt endorsed on the bill of sale, dated the first *May*, 1809, signed by *John Barnard, Samuel Dill, Oliver Greenwood and August E. Baker*, by which they acknowledge to have received from the plaintiff, among other things, the cows and sheep above-mentioned, which had been purchased by the plaintiff, at the sheriff's sale, which, with the increase, they promised to return and redeliver to the plaintiff, within one year from the date; and they promised severally to be answerable each for one fourth of any of the cows, sheep, &c. which might be lost, destroyed, or not redelivered, within the year, with the interest on the value thereof.

It was proved, that in the autumn of 1809, the defendant, as *deputy sheriff*, went to the farm on which *Simpson* lived, and took the property in question by virtue of an execution delivered to him the twenty-first *September*, 1809, on another judgment against *Simpson*, at the suit of another \*person, and sold them, at auction, to one *White*, for sixty-four dollars and ninety cents.

*Simpson*, who was a witness, testified, that on the day after the sale of the property on the plaintiff's execution, he agreed with *Barnard*, the other person who gave the receipt to the plaintiff, to take back the property into his possession, on the same terms as were expressed in the receipt, and the property was accordingly delivered to *Simpson*.

The judgment in favor of the plaintiff was for a *bona fide* debt, and the sale on the execution was *public*, and without fraud, or any express or implied understanding between the plaintiff and *Simpson*, that the plaintiff would bid off the property for *Simpson's* benefit.

(a) Vide *Hoyt v. Golston*, 13 Johns. Rep. 141. 561. *Hurd v. West*, 7 Cowen, 752. *Orser v. Storms*, 9 Cowen, 687. *Sikor v. Buck*, 1 Wendell, 466.

It was objected, that the plaintiff had not such a possession, actual or constructive, as would enable him to maintain trespass; but the objection was overruled, and the point reserved. The judge charged the jury to find for the plaintiff, unless they believed there was fraud in the sale to him under the execution; and that the plaintiff was entitled not only to the value of the property, but to a compensation for its detention, up to the ensuing term.

The jury found a verdict for the plaintiff.

A motion was made to set aside the verdict, and for a new trial.

*Lynch*, for the defendant. The plaintiff had not such a property or possession, as would enable him to maintain trespass. To enable a person to bring trespass, he must, at the time when the act was done which constitutes the trespass, either have the *actual* possession in him of the thing, or a *constructive* possession in respect to the right actually vested in him. (*Smith v. Miles*, 1 *Term Rep.* 475, 480.) In *Ward v. Macauley*, (4 *Term Rep.* 489,) Lord *Kenyon* said, that the action of *trespass* was founded in *possession*; and that where *A.* had let a ready furnished house to *B.* he could not maintain *trespass* \*against the *sheriff*, for taking the furniture under an execution against *B.*; and in *Gordon v. Harper*, (7 *Term Rep.* 9, 12,) it was held, that the landlord could not, in such a case, maintain *trover*. By the terms of the receipt, *Barnard and others* were not bound to redeliver the property, but were responsible only for the value. They were at liberty to consider the delivery to them, as an absolute sale, and they might sell the property if they chose.

Again, the property was not delivered by the defendant to the plaintiff. Where the sale of goods is unconditional, unless possession accompanies and follows the sale, it is void against creditors. (2 *Term Rep.* 595. 1 *Cranch's Rep.* 316.) It is true, this was a *judicial* sale, but the principle is equally applicable to all sales; otherwise, a *judgment* might be used for the purpose of defeating creditors.

*Gold, contra. Trespass* lies by a person having the general property, where there is a naked bailment for the gratuitous use of the bailee. (5 *Bac. Ab. Tresp.* (C.) *pl.* 9. 16. 17. *Latch.* 214. *Co. Litt.* 37.)

In *Kidd v. Rawlinson*, (2 *Bos. & Pull.* 59,) it was held that where the goods of *A.* taken in execution were put up to sale by the *sheriff*, and *B.* became the purchaser, and took a bill of sale, and permitted *A.* to continue in possession of the goods, the bill of sale was valid against a creditor or purchaser, who might afterwards get possession of the goods.

NEW-YORK,  
October, 1811.

PUTNAM  
v.  
WILEY

[ \* 434 ]

NEW-YORK, October, 1811. The same principle was laid down by this court in *Vredenburgh v. White*. (1 *Johns. Cas.* 156. See 4 *Dallas*. 167, 208.)

PUTNAM  
v.  
WYLEY.

Again, where a person comes to impeach a former sale, he must show himself to be a *bona fide* creditor, or purchaser, for a valuable consideration. (*Rob. on Fraud. Convey.* 489. *Holt's Rep.* 327. *Skin.* 586.) That they were taken under a judgment, makes no difference. The plaintiff is equally bound to show that the judgment was for a just and *bona fide* debt.

Again, the direction of the judge, as to the compensation and damages, subsequent to the act of *trespass* complained of, was incorrect.

[\* 435]

\**Per Curiam.* The plaintiff cannot recover. The case is within the decision of *Ward v. Macauley*; (4 *Term Rep.* 489;) and that case was no more than a recognition of the settled principle, that a plaintiff cannot bring trespass for taking a chattel, unless he has the actual or constructive possession, at the time. He must have such a right as to be entitled to reduce the goods to actual possession when he pleases. A carrier is only a servant of the owner, and the possession of the servant is the possession of the owner. But here the plaintiff, by accepting of the agreement in writing from *Barnard* and others, let the chattels in question to them for a year, and it would have been trespass for him to have taken them out of their hands. It was a hiring for a valuable consideration, and not a *nude pact*; for *Barnard* and the other lessees were to return the animals with their increase. This promise to deliver the increase of the animals, was a consideration for the use; for, according to the general principle of law, such increase belongs to the person who, by hiring for a time, becomes temporary proprietor of the animal. (*Wood v. Ash, Owen*, 138. See also, *Pothier, Traite de Droit de Propriete*, No. 153, 154, 155.) The jury have decided that there was no actual fraud or collusion; and the goods, after the sheriff's sale, were not left by the plaintiff, as creditor, with the debtor; but they were delivered to third persons, without any previous agreement with *Simpson* and whether they should be left in the possession of *Simpson* depended upon his subsequent agreement with *Barnard* and others. From the testimony of *Simpson*, it appears, that this agreement with him was subsequent to the contract between the plaintiffs and *Barnard*. The case, therefore, does not touch the question, how far a creditor, after purchase at a sheriff's sale, can safely leave the goods in possession of the defendant. The case of *Kidd v. Rawlinson*, (2 *Bos. & Pult.* 59,) allows a third person, or stranger, who becomes the pur-

chaser, to grant this indulgence, \*and whether the creditor may not also exercise the same humane indulgence, if it be done in good faith, is a question not now before us. (a) The verdict must be set aside, and as the point was reserved at the trial, upon a motion of the judge, against the right of recovery, a nonsuit must be entered.

NEW-YORK,  
October, 1811  
MENDERBACK  
v.  
HOPKINS.

Judgment of nonsuit.

(a) Vide *McIntry v. Tanner*, 9 Johns. Rep. 185. *Farrington v. Caswell*, 15 Johns. Rep. 430.

—  
MENDERBACK against HOPKINS.

IN error, on *certiorari*, from a justice's court.

*Hopkins* sued *Menderback*, by warrant, before the justice. The declaration was for money paid, and money had and received, and, also, that *Hopkins*, as a constable, on the twelfth December, 1807, had an execution against *Menderback*, at the suit of *Winne* and *Blair*, for four dollars and ninety-nine cents; and that he, *Hopkins*, paid the amount to *Winne* and *Blair*, but had never received it of *Menderback*; and, also, on the twentieth November, 1806, an execution in favor of one *Sternbey* against one *Whipple*, for five dollars and eighty-seven cents, was delivered to him, *Hopkins*, as a constable, to be collected, and that he delivered the execution to *Menderback*, who was then a constable also, to be collected, and that he, *Hopkins*, was afterwards compelled to pay the amount to *Sternbey*; and that *Menderback*, afterwards, gave him, *Hopkins*, an order on one *M'Gee*, for the amount, which had never been paid, &c.

There was a trial by jury, and *Hopkins* proved the payment of the amount of the execution, and the order drawn in his favor by *Menderback*, for five dollars and eighty-seven cents, which was unpaid. No objection was made to the evidence; and the jury found a verdict for the plaintiff for twelve dollars and sixty-eight cents.

\**Per Curiam*. The demand for the money paid on the execution, was illegal, without showing a previous demand on

Where a constable who has an execution, pays the amount to the plaintiff, without any demand of, or request by, the defendant, he cannot maintain an action against the defendant for the money so paid, without request. (a)

Where no objection is made to the evidence given at a trial before a justice, but the whole is submitted to the jury, every inference will be drawn, that could have been drawn, and every reasonable intentment allowed, in support of the verdict.

[\* 437 ]

(a) Vide *Jones v. Wilson*, 3 Johns. Rep. 434. *Beach v. Vandenburgt*, 10 Johns. Rep. 361. *Overseers of Walkill v. Overseers of Mamakating*, 14 Johns. Rep. 87. *Renss. Glass Factory v. Reid*, 5 Cowen, 587.

NEW-YORK,  
October, 1811.

FINK  
v.  
HALL.

the defendant below, and a request by him to make the payment ; but, as no objection was made to the evidence, a demand and request may have been presumed. It was to be inferred, as admitted, when nothing was said to the contrary. The question as to due diligence in presenting the order, and the non-payment thereof, does not appear to have been raised or agitated. Indeed, as no objection was made to any of the testimony, but it was submitted to the jury, every inference that could be drawn from the evidence is to be presumed to have been drawn ; and the verdict, by reasonable intendment, is good. The judgment must, therefore, be affirmed.

Judgment affirmed.

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FINK *against* HALL.

In an action before a justice, it is too late for the party to ask for an adjournment of the cause, after the jury are sworn and empanelled.

Where the jury do not retire from the court, to consider of their verdict, it is unnecessary that a constable should be sworn to attend them.

[ \* 438 ]

IN error, on *certiorari*, from a justice's court. *Hall* brought an action against *Fink*, for work, labor and services, done and performed by his son, for *Fink*. The defendant below pleaded the general issue, and offered to set off damages for a breach of a contract, stating, at the same time, that he had once sued *Hall* on this contract, in the *Otsego* Common Pleas, and that judgment had been rendered in favor of *Hall*. The claim offered was the same as had been there tried. The parties agreed to an adjournment, and a *venire* was issued, at the request of the defendant below. On the day to which the cause was adjourned, the parties appeared, and after the *venire* was returned, and the jury empanelled, the defendant requested a further adjournment, on account of the absence of one of his witnesses, and offered to make oath and give security. On being asked by the justice what he wanted to prove by this witness, he said he did not deny that the plaintiff's son had worked for him, but that he intended to insist on the set-off, and then stated what he intended to prove by the witness, but the proof was not set forth in the return ; though it was to be inferred it was something in relation to the set-off. The justice decided, that the evidence would be inadmissible, and refused the adjournment. The jury, after hearing several witnesses, gave a verdict for the plaintiff, for eight dollars and seven cents, on which the justice gave judgment.

On the return to the *certiorari*, the objections were,

1. That the justice ought to have granted the second adjournment.

2. That it did not appear that a constable was sworn to attend the jury.

*Per Curiam.* The judgment must be affirmed. Without deciding whether the justice ought to have granted the adjournment, (notwithstanding his opinion as to the admissibility of the evidence,) had the application been in season, yet the application was too late, after the jury was empanelled. The trial of the cause must be deemed to have commenced.

It does not appear from the return, that the jury withdrew from the court; and if not, it was not necessary to swear a constable. In the case of *Van Down v. Walker*, (2 *Caines*, 373,) it appeared that the jury retired, and the court there say, it should appear that a constable was sworn to attend them.

Judgment affirmed.

NEW-YORK,  
October, 1811.

RICHARDSON  
v.  
SMITH.

\*RICHARDSON *against* SMITH.

[ \* 439 ]

THIS was an action of *assumpsit*. The declaration contained three counts. The two first counts were on a *special agreement*, for the exchange of notes between the parties, and a warranty of the note exchanged and delivered by the defendant to the plaintiff. The third count was for money had and received, to the use of the plaintiff, money paid, &c. To the two first counts there was a demurrer, and a judgment thereon for the defendant. To the third count, the defendant pleaded the general issue. The cause was tried at the *Cayuga* circuit, in *June*, 1811, before Mr. Justice *Yates*.

At the trial, the plaintiff offered in evidence the *special agreement*, in support of the money count. The evidence was objected to, but admitted; and the jury, under the direction of the judge, found a verdict for the plaintiff.

A motion was made to set aside the verdict, for the misdirection of the judge.

*Cady*, for the defendant.

*Rodman and Richardson*, contra.

(e) A plaintiff can only abandon his special, and resort to his general count, where the proof is adapted to the latter. It can never be allowed where the plaintiff might sustain a proper count on the special agreement. A contrary rule would enable him in every case, by his mere volition, to convert a special contract into a general *indebitatus assumpsit*. *Robertson v. Lynch*, 18 *Johns. Rep.* 456. *Vide Culver v. Barnet*, 1 *Tyler*, 182.

A special agreement for the exchange of notes, with a warranty of the note exchanged, cannot be given in evidence in support of the money counts. (a)

NEW-YORK,  
October, 1811.

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CARTER
v.
PHELPS's
Administrator.

Per Curiam. The verdict must be set aside, and a new trial awarded, with costs to abide the event. Such a special agreement could not be given in evidence, under the money counts. It would be going beyond all precedent, and produce the greatest surprise on the defendant. Even if the evidence had been admissible, it did not support the warranty alleged.

New trial granted.

[* 440]

*CARTER *against* PHELPS's Administrator.

In an action of *assumpsit* against an administrator, the plaintiff in his declaration stated that the promise was made by the intestate in his life-time, and by the defendant, "administrator as aforesaid," since the death of the intestate. The declaration was held sufficient, especially, after verdict, it being tantamount to alleging that the promise was made by the defendant, *as administrator*.

A count on a promise made by an *executor*, or *administrator, as such*, and for which he is not personally liable, may be joined with a count on a promise made by the testator or intestate; and whether the promises be in one and the same, or in separate counts, is immaterial. (a)

(a) Vide *Meyer v. Cole*, 12 Johns. Rep. 349. *Demott v. Field*, 7 Cowen, 58. *Reynolds v. Reynolds*, 3 Wendell, 244. *Palmer v. Palmer*, 5 Wendell, 91. *Christopher v. Stockholm*, Id. 36

A motion was now made, in arrest of judgment, 1. Because ^{NEW-YORK} *the promise by the intestate and the defendant were joined in the same counts.

2. Because the promise, set forth in the five last counts, ought to have been alleged to have been made by the defendant, *as administrator*, &c.

October, 1911.

CARTER
v.
PHELPS's
Administrator.

The cause was submitted to the court, without argument.

Per Curiam. There is no well-founded objection to the counts in the declaration. In all of them the cause of action is stated to have arisen in the life-time of the intestate, and though the promise by the defendant is not stated to be made by him *as administrator*, yet it is stated, in every instance, that the cause of action arose, and a promise to perform it was made, by the intestate, and a promise also by the defendant, "administrator as aforesaid." In one part of the fifth count, this addition is omitted, but in the latter part of the count, the notice of the value of the service is stated to be given to him, "administrator as aforesaid." The breach states, that all the defaults were by the intestate, in his life-time, and by the defendant, "administrator as aforesaid." In no one instance, is the defendant charged in his own right. He is charged throughout, as administrator, and any objection to the omission in stating the promise to have been made by him, *as administrator*, or in omitting that addition in part of the fifth count, was, in this case, only the omission of matter of form, and is good after verdict. The case of *Brigden v. Parkes* (2 *Bro. & Pull.* 424.) is not applicable; for there the executor was charged as being liable in his own right, and the cause of action to have arisen after the testator's death. If any one count had so charged the defendant, it is admitted, it could not have been joined with a count against him, in his representative character. But a count on a promise made by an executor or administrator, *as such*, and in which he is not charged as personally liable, may be joined with a *count on a promise made by the intestate. The rule has become settled. (1 *H. Bl.* 102. *Secar v. Atkinson*. 7 *Bro. Parl. Cas.* 550. *Ex'r's of Hughes v. Hughes*. 6 *Johns. Rep.* 116. 1 *Chitty on Pleading*, 205. b. 2 *Chitty on Pleading*, 61.) Whether the promise by the intestate, and subsequently by the administrator, for the same cause, be in one or in distinct counts, cannot be material, nor affect the principle. The motion in arrest of judgment must, therefore, be denied.

[* 442]

Motion denied.

339

NEW-YORK,
October, 1811.

M'DONALD

v.

RAINOR.

M'DONALD *against* RAINOR and VANTINE

In an action by the payee of a promissory note, against the maker, bro't before a justice, the defendant pleaded that the note had been endorsed by the payee, and that the endorsee had sued the defendant on the note before another justice; but it appearing that in that suit the maker objected to the title of the endorsee, or to some defect in the endorsement, in conse-
[* 443] quence of which no recovery was had on the note, it was held that the plea was no bar, and that the defendant could not, in this suit, set up the endorsement as good, which he had, in the former suit, shown, or attempted to show, to be bad.

The defendants in error brought an action against the plaintiff in error, and declared against him on a note drawn by him to them for fourteen dollars and sixty-five cents, dated 13th April, 1809; also, on an account, for eleven bushels of oats, and on an order, in favor of *Edmund Rogers*, to the amount of one dollar. To the note, the plaintiff specially pleaded, that it had been endorsed to *James P. German*, and not endorsed back to the plaintiff; and further, that he had been sued by *German*, and discharged by the jury from the note, and that the endorsement was void, because *Rainor* had made use of *Vantine's* name, in the endorsement. To the residue of the plaintiff's demand, the defendant pleaded *non assumpsit*, and a set-off. On the trial, the defendant admitted himself answerable for the order, and there was some circumstantial evidence about the oats, and positive proof as to delivery of part. The defendant then introduced the record of a trial in the cause, in which he was plaintiff **against James P. German*, wherein it appeared, that *German* attempted to *set off* this note, and that *M'Donald* objected to its allowance, alleging the endorsement to be illegal, because *Vantine* had not signed it. And the jury who tried the cause, after returning to give their verdict, delivered the note to the justice to be returned to *German*. The plaintiff then offered to prove, by several of the jurors who tried the cause, mentioned in the record which the defendant introduced to show that the note was not allowed to *German*. This evidence was objected to, but admitted, and that fact was fully proved by several of the jurors.

The justice then stated in his return, that after hearing the proof and allegations of the parties, and taking four days to consider, he gave judgment for the plaintiffs, for twenty-one dollars and twelve cents.

Per Curiam. The judgment must be affirmed. The proof, as to all the demands of the plaintiffs below, exclusive of the note, was clearly such as could not warrant this court in reversing the judgment on that ground; and the circumstances relative to the note were sufficient to authorize the justice to allow it. It is unnecessary to say whether the justice was correct or not, in admitting the jurors, on the trial between the defendant and *German*, as witnesses, to prove what was

then done with respect to this note. This testimony was immaterial, and went to establish nothing more than what the defendant himself had proved, by the record of that trial.

This record shows that the plaintiff in error objected against the payment of the note to *German*, on account of some defect in the endorsement, so that the title to the note was not vested in *German*. This objection prevailed, and he avoided a payment to *German*, and he shall not be allowed, in opposition to his own proof, to say the endorsement to *German* was good. But admitting that he might set this up, there was no evidence offered, *by the defendant below, to show that the note had been endorsed, or that the plaintiffs had ever, in any way parted with their interest in it; and if not, there could be no objection against their recovering it from the defendant, who, clearly, by his own showing, has never paid it to any person.

NEW-YORK,
October, 1811.

WILBUR
v.
How.

Judgment affirmed.

WILBUR *against* How.

IN error, on *certiorari*, from a justice's court.

How brought his action against *Wilbur* before the justice. The plaintiff in his declaration stated, that a contract or job, for making a certain road, was set up at auction, and it was agreed between the plaintiff and defendant, that if either of the parties should bid off the job, it should be divided between them; and that *Wilbur* bid off the job, but refused to give *How* a share in it according to his agreement, for the breach of which the plaintiff claimed damages, and the jury found a verdict for the plaintiff for twenty dollars, on which the justice gave judgment.

Per Curiam. This case comes within the principle laid down in *Doolin v. Ward*. (6 *Johns. Rep.* 194.) The contract was a *nudum pactum*, and a fraud on the vendor. The judgment below must be reversed.

Judgment reversed.

was held, that the agreement was without consideration, and void.(a)

Where the contract or job for making a road, was put up for sale at auction, and *A.* and *B.* agreed that one of them should bid, and if the contract should be struck off to the one bidding, the other should have an equal share in it, and it was struck off to *B.* a against whom *A.* afterwards brought an action for a breach of the agreement between them; it

a) *Vide Briggs v. Tillotson, supra*, 304

NEW-YORK,
October, 1811.

DURELL
v.
MOSHER.

*DURELL against MOSHER.

Where a juror, summoned in a cause before a justice, had said "that if the reports of the neighbors were correct, the defendant was wrong, and the plaintiff was right," this was held not to be a sufficient objection to his being sworn and empanelled. (a)

In an action of *trover*, proof that the defendant promised to return the goods to the plaintiff, and that he had not returned them, is sufficient evidence of a conversion; and a previous demand and refusal, need not be proved. (b)

IN error, on *certiorari*, from a justice's court. *Mosher* brought an action of *trover* against *Durell*, before the justice, for sheep.

A *venire* was issued, and returned, and the defendant objected to two of the jurors on the panel, that they had sat as jurors on a former trial between the parties, as to the same subject matter of controversy: but it appeared, that the cause had been dismissed, without any verdict being given, and the justice, therefore, admitted the jurors, in this cause. The defendant then objected to another juror, because that he had said, in a conversation about the controversy, that the defendant was wrong and the plaintiff was right; but it was also proved, that he, at the same time, said, that he had no personal knowledge of the matter in dispute, but that if the reports of the neighbors were correct, the defendant was wrong and the plaintiff was right. The justice admitted the juror as competent.

On the trial, it was proved, that the defendant below had taken two sheep and two lambs out of the flock of the plaintiff, supposing they belonged to him, the defendant; and that he had, afterwards, promised to return the sheep to the plaintiff, but had failed to do so.

The jury found a verdict for the plaintiff, for eight dollars.

Per curiam. The objection to the jurors was unfounded. The third juror objected to, had given no decided opinion on the merits of the cause. His declaration was hypothetical. Though a demand and refusal of the sheep was not proved; yet the promise by the defendant to return them, and a failure to do so, was evidence of a conversion. The judgment must be affirmed.

Judgment affirmed.

(a) *Vide People v. Mather*, 4 Wendell, 229.

(b) *Vide Everett v. Coffin*, 6 Wendell, 603.

NEW-YORK,
October, 1811.BEALS
v.
GUERNSEY.

*BEALS against GUERNSEY.

THIS was an action of *trespass*, brought to recover the value of seventy-three barrels of *whiskey*. The cause was tried, at the *Ontario* circuit, before Mr. Justice *Yates*, on the 27th *June*, 1811.

A witness testified that on the 18th *July*, 1807, he sold to *Moses Johnson* ninety-five barrels of *whiskey*, at fifty-six cents per gallon, which was endorsed on a bond given by the witness to *M. Johnson* payable in *whiskey*. Seventy-three barrels of the *whiskey* were put in the store of *Ezekiel Taylor*, in the village of *Canadaquai*. *Johnson* was then a prisoner, *within the liberties of the prison*, having been surrendered by his bail, and notoriously a bankrupt.

The defendant, as sheriff of the county of *Ontario*, on the second *Monday of November*, 1807, sold the *whiskey* in the state of *Taylor*, by virtue of a *test. s. f. a.* issued against *Johnson*, on a judgment obtained against him, on the 12th *November*, 1805, at the suit of *William W. Rodman*. The execution was returnable on the second *Monday of November*, and was delivered to the sheriff on the 18th *September*, 1807. At the time, and before the sale, the plaintiff, who was present, gave notice that the *whiskey* was his property, and forbade the defendant to sell it.

The plaintiff gave in evidence a bill of parcels of ninety-five barrels of *whiskey* sold to him by *Moses Johnson*, dated *August 28, 1807*, at fifty cents per gallon, amounting to 1,964 dollars, on which was endorsed a receipt of payment, by a note of hand, in full.

From the testimony, it appeared that the plaintiff and several others, became bail for *M. Johnson*, for the liberties of the gaol, and that *Johnson* delivered sundry bonds and notes to them for their indemnity, among which was the bond on which the *whiskey* was endorsed in part payment, and that the *whiskey*, when purchased, was delivered to *N. Gorham*, goods to the vendee, at the time of sale, is only *prima facie* evidence of fraud, and may be explained by circumstances. (c)

An execution does not bind the goods of the debtor till delivered to the sheriff.

In actions of *trespass*, for taking the goods of the plaintiff, as well as in *trover*, the jury, in their discretion may allow, besides the value of the goods at the time of the *trespass*, interest on the amount from that time to the judgment, by way of damages. (d)

(a) But the objection to the want of the *postea* must be made at the trial, otherwise it will be held to have been waived. *White v. Kitting*, 11 *Johns. Rep.* 128. *Vide Powell v. Walters*, 17 *Johns. Rep.* 176. *Wilbar v. Selden*, 6 *Cowen*, 162.

(b) *Acc. Wickham v. Miller*, 13 *Johns. Rep.* 320. *Vide Statson v. Brown*, 7 *Cowen*, 732. *Bissell v. Ball*, 9 *Johns. Rep.* 132.

(c) *Barrie v. Paxton*, 5 *Johns. Rep.* 258. *Butts v. Swartwood*, 2 *Cowen*, 431. *Bissell v. Hopkins*, 3 *Cowen*, 166. But see *Sturtevant v. Bullard*, 9 *Johns. Rep.* 327.

(d) *Vide Renss. Glass Factory v. Reid*, 5 *Cowen*, 587. *Bissell v. Hopkins*, 4 *Cowen*, 53. *Wilson v. Conine*, 2 *Johns. Rep.* 280

It seems, that evidence of what a witness, since deceased, swore at a former trial, between the same parties, is not admissible, unless accompanied with the postea or record of the former suit. (a)

Though a purchaser of goods knows of a judgment against the vendor, at the time of the sale, that fact will not, of itself, render the sale fraudulent or void; but if he knows of the judgment, and purchases with the view and for the purpose of defeating the creditor's execution, it is fraudulent, and the sale is void notwithstanding a full price has been paid by the purchaser. (b)

The sale must be bona fide, as well as for a good consideration. [*447]

The non delivery of the

NEW-YORK,
October, 1811.

BEALS
v.
GREENSBY.

one of the bail, for their indemnity. On the 28th *August*, 1807, *Gorham* and another offered to purchase the whiskey, and *Johnson* said he wished to sell it, to prevent its being taken in execution at the suit of *Rodman*, and his thereby gaining a preference over other creditors. *Johnson* wished to get a better price than was offered; but on the same day, sold it to the plaintiff, and deposited his note taken in payment, in the hands of Mr. *Greig*, as security for his bail. *Gorham*, on being informed that the note was in the hands of *Greig*, directed *Taylor*, with whom the whiskey was stored, to deliver it to the plaintiff whenever he wished to take it, as he had purchased it of *Johnson*; and the plaintiff called at *Taylor*'s store to receive the whiskey; but on account of the sickness of *Taylor*, it was not then actually delivered.

It was testified that *Greig* had in his possession, in the autumn of 1807, a note dated the 28th *August*, 1807, signed by the plaintiff, for 1,964 dollars, payable in good whiskey, at fifty cents per gallon, on the 1st *September*, 1808; but whether it was the same note mentioned in *Johnson*'s receipt, endorsed on the bill of parcels, the witness could not say, except from report.

It appeared that the defendant had given due notice to the plaintiff to produce the note, given by the plaintiff to *M. Johnson* for the whiskey, in evidence at the trial of the cause.

The defendant proved that the judgment on which the execution issued was for twenty thousand dollars, on a warrant of attorney, given to secure the creditors of the defendant named in the condition of the bond, for debts *bona fide* due to them from *Johnson*. The plaintiff, then, offered to prove that this action was tried at the *preceding circuit, when one *Tiffany* was sworn as a witness in the cause, but was since dead; and that he testified that he was present when *Johnson* sold the whiskey to the plaintiff, and that the sale was *bona fide*. The defendant's counsel objected to the evidence, unless the plaintiff also produced the *nisi prius record and postea* of the trial. But the judge overruled the objection, and admitted the evidence.

The jury, under the direction of the judge, found a verdict for the plaintiff, for 1,952 dollars and ninety-one cents, which sum included the value of the whiskey, at the time it was sold by the defendant, and also four hundred and thirteen dollars and sixteen cents for the *interest*, from the time of the sale, to *August* term last; and it was agreed, that if the court should be of opinion that the sum allowed as damages, by way of interest, ought not to have been allowed, it should be deducted from the amount, unless a new trial should be granted, for some other cause.

A motion was made to set aside the verdict, and for a new trial; 1. Because the sale of the whiskey by *M. Johnson* to

the plaintiff was fraudulent, as against creditors ; 2. Because NEW-YORK,
October, 1812 improper evidence was admitted.

BEALS
v.
GUERNSEY.

Cady, for the defendant. 1. By the 2d section of the statute (*sess. 10. c. [44. L. R. S. 137. s. 1.]*) for the prevention of frauds, all conveyances, sales, &c. made with intent to hinder, delay or defraud creditors, are declared void. It was enough for the defendant to prove that the intention of *Johnson* was fraudulent. He was not bound to prove further that the plaintiff knew that it was fraudulent. It was for the plaintiff to avail himself of the *sixth* section of the act, and show that he was a *bona fide* purchaser, upon a good consideration, and without notice of the fraud. Whether a deed of sale is fraudulent, or not, in regard to creditors, depends on the motives of the party making it. (8 *Term Rep.* 530. *Le Blanc, J. Shep. Touch.* 67.)

It was clearly proved, that *Johnson* declared that he *sold the whiskey to defeat his creditors. And what evidence does the plaintiff produce that he was a *bona fide* purchaser, without notice ? Nothing but the receipt of *Johnson* himself for a note, which ought to have been produced at the trial, or the payment of it fully proved. A sale by the debtor, pending a suit against him, is always considered a badge of fraud. But conveyance of the defendant's goods, after a judgment against him, is held to be a much deeper complexion of fraud. (*Rob. on Fraud. Conv.* 578. *Doug.* 88.) And if the purchaser has knowledge, in fact, of the judgment against the vendor, the sale has been held void, under the statute of 13 *Eliz.* from which the second section of our act is copied, notwithstanding a full price has been paid.

Whatever is sufficient to put a party on inquiry, is a constructive notice. (1 *Johns. Cas.* 53.) The plaintiff knew of the suits against *Johnson*, and that he was a bankrupt. The plaintiff himself was *bail* for the liberties. He must be charged with knowledge of the judgment in favor of *Rodman*, as he knew all the facts which necessarily led to that result. To render the sale valid, it should be shown that the plaintiff had no manner of notice of the judgment. But the plaintiff, when he made the purchase, was bound to make inquiry, as to the judgment. (*Rob. on Fraud. Conv.* 406. *Cowp.* 432.) Acts of doubtful complexion are construed to be within the general rule, for the sake of preventing fraud.

Again, it is to be observed, that the sale to the plaintiff was not for the purpose of raising money to satisfy a creditor, nor in the ordinary course of trade. It was on a credit of thirteen months, and for a note payable, not in money, but in *whiskey*, at the same price. In order to determine whether a sale is fraudulent or not, within the statute, it is material to in-

[*449]

NEW-YORK,
October, 1811.

BEALS
v.
GORHAM.
[* 450]

quire into the value of the property, and the value and tangibility of that substituted in its place. (6 *East*, 251.)

2. In *Patton v. Walter*, (1 *Stra.* 162. *Peake's Ev.* [8d edit.] 50;) it was held that though the *postea* was no evidence of the verdict, without showing *the final judgment, yet it was evidence of a trial, so as to introduce an account of what a witness swore, at the trial, who was since dead. According to the rule of evidence, recognised by this decision, the evidence of what the witness swore at the former trial, was inadmissible, unless accompanied with the *postea*.

E. Williams, contra. The question, as to the plaintiff's knowledge of the motives or intention of *Johnson*, was left to the jury. If the fraud was not brought home to the plaintiff, he is not to be affected by it. Fraud is never presumed. The jury, by their verdict, have found that there was no fraud. A judgment does not bind personal property, and the execution was not issued, until some time after the sale.

Admitting the note taken in payment was for whiskey, deliverable at a future day, it was something equally valuable and tangible as the whiskey sold. It might, at a future day, be much more valuable.

Again, a bond payable in whiskey was delivered to *Gorham*, for the security of the bail of *Johnson*, who was a trustee of the whiskey for their benefit. The equitable title was in the bail of the plaintiff.

Johnson was a *nominal* owner. The whiskey was delivered to *Gorham*, who had the agency relative to it, and who gave directions for its delivery to the plaintiff, who would have taken it immediately into his possession, had it not been for the illness of *Taylor*, in whose store it was deposited. It was not in possession of *Johnson*, at the time of the delivery of the execution to the sheriff.

Per Curiam. The two principal points, in this case, are, 1. Whether the sale of the whiskey to the plaintiff, was, under the circumstances of the case, fraudulent; and, 2. Whether the testimony of what was sworn by *Tiffany*, upon the former trial, was admissible.

*The better opinion seems to be, that if the testimony of what a witness swore at a former trial, be unaccompanied with the *postea* or record of the former suit, and that be made an objection, at the time, to the admission of such testimony, the objection is good. It was so ruled in 2 *Show*, 168, *Anon.*; and other cases admit the existence of the rule. (1 *Stra.* 162. *Peake's Ev.* 40.) But the question here is, whether even, independent of that testimony, the plaintiff would not have been entitled to recover.

[* 451]

When the plaintiff bought the whiskey, there was a judgment against *Johnson*, of two years' standing, and he was also under arrest, and upon the liberties of the gaol and a reputed bankrupt. But the execution in this case was not issued and delivered to the sheriff, until some time after the sale, and there was no evidence to bring home to the knowledge of the plaintiff the existence of the judgment in favor of *Adman*. There were no circumstances to warrant the inference that the plaintiff knew of that judgment, and purchased the whiskey with an intent to defeat the execution upon it. As the judgment was nearly two years old, the plaintiff cannot well be supposed (admitting he knew of such a judgment) to have purchased, for the purpose of defeating that creditor, for what ground had he to presume any immediate execution, considering the delay that had already taken place since the date of the judgment? The circumstance of the non-delivery of the property is sufficiently accounted for, by the sickness of *Taylor*, in whose store it was deposited, and it was there not in the custody of *Johnson*, but of *Gorham*, one of the bail to the sheriff, for the liberties granted to *Johnson*. If this purchase be fraudulent and void, there would be no safety in dealing, in personal property, with a man against whom there was a judgment. The old cases, before the statute of frauds of 29 Car. II. have said, that if a man, after judgment, and to defraud execution, sell his goods *for a valuable consideration, and the buyer knew of the judgment, the sale is void under the 13 Eliz. c. 5. (*Dalison's Rep.* 79.) But the modern doctrine is not merely that the purchaser must know of the judgment. That fact will not, of itself, defeat a *bona fide* sale, or make it, in judgment of law, fraudulent. If that was the rule of law, it would put a most inconvenient check to the circulation of personal property. The rule is, that the purchaser, knowing of the judgment, must purchase, with the view and purpose to defeat the creditor's execution; and if he does it with that purpose, it is iniquitous and fraudulent, notwithstanding he may give a full price. The question of fraud depends upon the motive. The purchase must be *bona fide*, as well as upon good consideration. This was the rule as declared by Lord *Mansfield*, upon repeated occasions. (4 *Burr.* 474, 475. *Conn.* 434.) The non-delivery of the goods, at the time of the sale, is, of itself, a circumstance of fraud, as was stated in *Twyne's* case; (3 *Co. 80.* b.;) but it is only *prima facie* evidence of fraud, and the circumstance may admit of explanation. (10 *Ves.* 145. 2 *Bos. & Pull.* 59.) Here it is fully explained. The statute of frauds on this point, and which we have adopted, (*Laws*, vol. 1. 389. [2 *R. S.* 365. sec. 13,]) says, that the execution shall not bind goods, but from the delivery, and

NEW-YORK
October, 1811

BEALS
v.
GUERNSEY.

[* 452]

NEW-YORK,
October, 1811.

JONES
v.
SCRIVEN.

[*453]

this provision was made for the benefit of purchasers. In one case Lord *Hardwicke* held that a sale of goods might be valid, even after delivery of the execution, and until execution executed. (*Lowthal v. Tompkins*, 2 Eq. Cas. Abr. 381.)

As here was not evidence to warrant the inference, that the purchase by the plaintiff was made with intent to defeat the execution of *Rodman*, and, especially, as there was no evidence that the plaintiff ever knew of that judgment, the verdict was correct, and the charge of the judge well founded.

The *interest* which was allowed, by way of damages, was just. The plaintiff ought not to be deprived of his property, for years, without compensation for the loss of *the use of it, and the jury had a discretion to allow interest in this case, as damages. It has been allowed in actions of *trover*, and the same rule applies in *trespass* when brought for the recovery of property. The motion on the part of the defendant must be denied.

JONES against SCRIVEN.

In an action for a *deceit*, in the sale of a certain improvement, or patent right, before a justice, the defendant set up, in defense, a former trial and judgment in an action brought by him before a justice, against the plaintiff on a promissory note given for the purchase money, in which suit the present plaintiff set up the *deceit* in the sale, as a defense against the note, and the same was considered by the justice, and a judgment given for the plaintiff, for the amount of the note; it was held, that the first trial and judgment was a complete bar to the second suit for the *deceit*. (a)

IN error, on *certiorari*, from a justice's court. *Scriven* brought an action of *deceit* and *warranty* against *Jones*, for selling the art of manufacturing pot-ashes, in a new and improved mode, which he represented to be of great utility; and to induce the plaintiff to buy the art, he affirmed that the ashes would melt easier, and make one quarter more than in the common mode, &c. The defendant, at the trial, gave in evidence a former trial in a suit brought by *Jones* against *Scriven*, on a promissory note given by *Scriven* to *Jones*, for the art and skill of making pot-ashes, &c. at which trial *Scriven* proved, by two witnesses, that the patent or art was good for nothing; but the evidence preponderated in favor of the usefulness of the patent, and the justice, before whom the cause was tried, accordingly gave judgment in favor of *Jones*, for the note. On this testimony, the defendant below moved for a *nonsuit*; which was overruled, and a verdict found for the plaintiff, for twenty-five dollars.

Per Curiam. The defence in the former suit on the note, was not by way of set-off, but a direct objection to the consideration of the note; and the very point in issue in this plaintiff, for the amount of the note; it was held, that the first trial and judgment was a complete bar to the second suit for the *deceit*. (a)

(a) Where a demand has been once submitted to a jury and passed upon by them, it is a complete bar to another action for the same cause. *Curtis v. Great*, 6 Johns. Rep. 168

cause; *namely*, the value or worth of the art or skill sold, was tried and decided before. This very evidence was received by the jury, and the justice ought to have advised the jury that it was a bar, and the jury ought so to have found it. The judgment below must be reversed.

NEW-YORK,
October, 1811.

LANSING
v.
LANSING

Judgment reversed.

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*LANSING against LANSING.

[* 454]

IN error, on *certiorari*, from a justice's court. The defendant in error brought an action against the plaintiff in error, before a justice, on a note made by the plaintiff in error, payable thirty days after date, to *J. G. L.* or order, and endorsed by him. The plaintiff in error and *J. G. L.* made a bet of eight dollars, on the twenty-sixth *April* last, after the close of the poll, as to the election of the governor, and made their notes to each other, for the amount of the bet, which were deposited with one *Smith*. After the event of the election was known, *Smith*, the holder, delivered both the notes to *J. G. L.* the winner. It appeared that the note in question was endorsed after it became due; and that about a week after the election, the plaintiff in error and *J. G. L.* the payee, agreed that the notes should be given up and considered as nothing; and that a bet of suppers should be substituted instead of the eight dollars. There was a trial by jury, and a verdict for the plaintiff for eight dollars, on which the justice gave judgment.

Where a bet was laid, after the poll was closed, on the event of the election for governor, and the party gave his negotiable note for the amount of the bet, payable in 30 days, which was deposited with a stakeholder, and afterwards delivered to the winner, who endorsed it, after it became due; it was held that the endorser took the note, subject to all the defence existing against it, in the hands of the original payee, and that the note being given for such a *teager*, was void. (a)

Per Curiam. The plaintiff took the note, after it had become due, and subject, therefore, to every defence which existed against it, in the hands of the original payee. This case falls within the principle laid down in *Bunn v. Riker*, (4 *Johns. Rep.* 426,) that a bet involving an inquiry into the validity of the election of the governor, was void, on principles of policy. The judgment below must be reversed.

Judgment reversed.

(a) See *Mount v. Waite*, 7 *Johns. Rep.* 434, and the cases in note (a).

NEW-YORK,
October, 1811.

Brooks

v.

BEMISS.

*BROOKS against BEMISS.

In an action for a *libel*, the defendant pleaded the general issue, with notice of special matter in justification, stating that he would give in evidence, at the trial, a record of a trial of an indictment, before the General Sessions, &c. of the term of *June*, 1810.

The record produced was of a trial in the term of *June*, 1809; it was held, that the variance was not material, and that the record was admissible in evidence. (a)

It would be admissible, even in a case of special pleading, and more so in case of a notice

[* 456] subjoined to the general issue, which is regarded with less strictness than a special plea.

Where the libellous words charged in the declaration were: "But this is not the first time that the idea of falsehood and *M. B.* (meaning the plaintiff) have been associated together, in the minds of many honest men," (meaning, &c.)

It was held that evidence, that "Sundry honest men, to wit, *A. B.* (naming seven persons) and others, believed and considered the plaintiff not to be a man of truth, but addicted to falsehood," was not admissible, in justification; and that the defendant could only justify the charge, by proving the fact. (b)

(a) Vide *Page v. Woods*, 9 Johns. Rep. 82. *Jones v. Cook*, 1 Cowen, 309.

(b) Vide *Root v. King*, 7 Cowen, 13. *S. C. 4 Wendell*, 113. *Skinner v. Powers* 1 Wendell, 431.

libel, divers honest men, to wit, *N. P.* and others (naming them) believed and considered the plaintiff not to be a man of truth, but addicted to falsehood."

Issue was joined, in *May*, 1810, and the cause was tried at the *Ontario* circuit, in *June* last, before Mr. Justice *Yates*.

The publication of the libel was proved. And the defendant offered in evidence the record of a trial, in the Court of General Sessions, held, &c. of the term of *June*, one thousand eight hundred and nine, of an indictment against *William Adams*, for an assault and battery committed on the plaintiff, on which the jury found a verdict of not guilty, &c. The defendant also offered to prove, that the plaintiff was sworn as a witness, at that trial, and testified, as set forth in the notice to the plea of the defendant. This evidence was objected to, and rejected, by the judge, on the ground of the variance between the term of the court stated in the notice, and in the record produced. The defendant then offered to prove the facts stated in his notice, independently of the record, but the evidence was rejected. The judge charged the jury, that the matter set forth in the plaintiff's declaration was libellous, and amounted to a charge of perjury, and that they ought to find a verdict for the plaintiff. The jury found a verdict accordingly, for one hundred dollars, damages.

There was a motion for a new trial, and also in arrest of judgment.

NEW-YORK,
October, 1811

Brooks
v.
Remiss.

[* 457]

E. Williams, for the defendant.

Rodman, contra.

Per Curiam. The principal point, upon the motion for a new trial, is, as to the admissibility of the evidence, which was offered on the part of the defendant, and rejected by the judge.

The defendant offered in evidence the record of a trial at the *Ontario* sessions, of the term of *June*, 1809, and it was rejected, on the ground that the notice annexed to the plea, set forth that the record of a trial, of the term of *June*, 1810, would be given in evidence. The year in the notice was an evident clerical mistake, as the time specified in the notice was even subsequent to the joining of issue in the cause, and subsequent to the giving of the notice itself. The question is, whether the day in the notice was material to be proved exactly as stated. The notice did not affect to set forth the record according to its tenor, or with a *pro ut patet*, &c. and the allegation of the time was not matter of substance, but of description merely. The notice only intended to inform the plaintiff, that the defendant would rely upon an acquittal of

NEW-YORK,
October, 1811.

Brooks
v.
Bemiss.

* 458]

one *William Adams*, upon an indictment at the *Ontario* sessions, for an assault and battery upon the plaintiff, notwithstanding the plaintiff's oath. This was the substance of the notice, and the time was not material, so that it appeared to be before the publication of the libel. It was no further an essential part of the notice; and the record ought, accordingly, to have been received, notwithstanding the variance as to the time. This was the doctrine in *Purcell v. Macnamara*, (9 *East*, 157,) even in a case *of special pleading. This just and liberal rule applies, with still greater force, to the case of a notice, which has never been regarded with the same criticism and nicety as a special plea.

The matter offered in evidence, in justification of the first count, was properly rejected. The charge imported that the plaintiff was a liar. That was its meaning and substance; and that charge cannot be justified, by giving the opinion of one or more individuals. Such a species of defence might lead to the grossest abuse and calumny, even of a party of good general character, and of unimpeachable conduct. The defendant can only justify the charge by proving the fact.

But on account of the rejection of the evidence of the record, the verdict must be set aside, and a new trial awarded, with costs, to abide the event of the suit.

New trial granted.

NEW-YORK
October, 1811SEBRING
v.
WHEEDON

SEBRING against WHEEDON.

IN error, on *certiorari*, from a justice's court.

Wheedon brought an action of debt against *Sebring*, for neglecting to proceed on, and return, an execution against one *Edward Brown*. The defendant below was sued by *warrant*, and nothing appeared on the return to the attorney to show that any oath was made by the plaintiff below, that the defendant was about to depart from the county, or that the plaintiff was in danger of losing his debt. On the return of the warrant, the defendant moved for a nonsuit, *on the ground that he was a *freeholder*, and that he had been sued by warrant, without any oath having been taken by the plaintiff, and offered to prove that he was a freeholder. This proof the justice refused to hear, because the defendant had acknowledged that the *deed* for his land was not on record. The defendant then asked for an adjournment, to procure his testimony, and tendered bail to appear and stand trial. The justice refused to grant an adjournment, unless the defendant would make oath that he wanted some material witness. This the defendant refused to do, and the justice proceeded to try the cause, and gave judgment for the plaintiff, for twenty-five dollars.

Per Curiam. The judgment must be reversed. There is nothing upon the return, showing that the defendant was proceeded against as a *freeholder*, or inhabitant having a family, and the requisite evidence given to authorize a warrant against a person of that description. The 4th section of the act (*sess. 31. c. 204. Vide 2 R. S. 238. sec. 67, et seq.*) declares, that in all other cases, on the return of a warrant, if either party require an adjournment, and will give a sufficient security to appear and stand trial, the justice shall adjourn to some future day, not less than three, and not more than twelve days. The present case falls under this branch of the act, and the justice was bound to adjourn, on the security being tendered, without requiring an oath of the want of a material witness.

Judgment reversed.

(a) *Acc. Cross v. Moulton*, 15 Johns. Rep. 469. And see *Powers v. Lockwood*, 9 Johns. Rep. 133. *Hemstrout v. Youngs*, 9 Johns. Rep. 364.

A defendant was sued by warrant, before a justice; but it did not appear from the return to the *certiorari*, whether the defendant was, in fact, proceeded against as a *freeholder*. [* 459]

holder, or person having a family, and that the requisite evidence was given to authorize the issuing a warrant; and the defendant prayed for an adjournment for want of a material witness, and offered security to appear and stand trial; but the justice refused to grant an adjournment, unless the defendant would make oath that the witness was material, which being refused, the justice proceeded and gave judgment for the plaintiff. It was held, that the defendant was entitled to an adjournment, under the 4th sect. of the act; (*sess. 31. c. 204.*); and the judgment of the justice was reversed. (a)

NEW-YORK,
October, 1811.

SEBRING
v.
WHEEDON

*SEBRING against WHEEDON.

In an action before a justice, a *venire* was issued to summon a jury, which was delivered to the defendant. The defendant appeared at the time, but the *venire* was not returned, nor did the jury appear; and the justice, altho' the defendant objected, proceeded to try the cause, and gave judgment for the plaintiff. It was held that after a *venire* had been issued, the justice had no authority to try the cause, without a jury, it not appearing that the *venire* was improperly suppressed by the defendant; and that the justice ought to have issued a second *venire*, the first not having been returned. (a)

IN error, on *certiorari*, from a justice's court. *Wheedon* brought an action against *Sebring*, before the justice, for neglecting to serve an execution, in favor of *Wheedon* against one *Martin Woodruff*. On the return day of the warrant, the parties appeared, and issue being joined, the defendant requested a *venire*, which was issued, and delivered to the defendant. The cause was adjourned, by consent of the parties, to the second of *July*. On the day to which the cause was adjourned, the defendant appeared, and waited about an hour after the time. The plaintiff did not appear; the *venire* was not returned, nor did the jury appear. The defendant went away, and soon after the plaintiff came, and the justice proceeded to try the cause, without the jury. Before the trial was ended, the defendant appeared, and protested against the justice's proceeding; but the justice went on with the cause, and gave judgment for the plaintiff, for twelve dollars and fifty-eight cents.

Per Curiam. The judgment must be reversed. There is no suggestion that the *venire* was improperly suppressed by the defendant. After the jury process had been issued, it was not legal for the justice to proceed to try the cause, without a jury. It was competent to him to have issued a new *venire*, although the former one was not returned; and this was the course which he ought to have pursued, according to the doctrine laid down by this court, in the case of *Day v. Wilber*. (2 *Caines*, 137.) Nothing was done, on the part of the defendant, that could be construed into a *waiver* of a trial by jury, or an assent to a trial by the justice, within the case of *Blanchard v. Richly*. (7 *Johns. Rep.* 199.)

Judgment reversed.

(a) See *Chen v. Snyder*, 19 *Johns. Rep.* 324

NEW-YORK
October, 1811CHASE
v.
HALE.*CHASE *against* HALE.IN error, on *certiorari*, from a justice's court.

Hale brought an action of trespass on the case against *Chase*, for enticing away the wife of *Hale*. The defendant pleaded the general issue. It was proved, by two witnesses, that *Chase* said, "that as people talked so much about him and *Hale's* wife, and as *Hale* had become jealous of him, he intended to plague and torture him in that way, as much as he could." It was also proved that *Chase* had been seen a great number of times with *Hale's* wife, at different places, from her house, and under suspicious circumstances: and also, that the plaintiff had been frequently seen at the defendant's house. The justice gave judgment for the plaintiff, for fifteen dollars and eighty-four cents damages.

A justice of the peace has cognisance of an action of trespass on the case, for enticing away the wife of the plaintiff.

On the return to the *certiorari*, the objections were,

1. That the justice had no jurisdiction.
2. That the testimony did not support the charge alleged in the declaration.

Per Curiam. Neither of the objections taken to the return of the justice, are tenable. The action is trespass on the case, jurisdiction of which action is expressly given to justices of the peace: and the proviso in the statute, taking away their jurisdiction in certain actions, does not extend to actions like the present. The testimony fully supported the declaration, without adopting the rigid rule of the old law, which was so strict on this point, that if one man's wife missed her way on the road, it was not lawful for another man to take her into his house, unless she was benighted, and in danger of being lost or drowned. The evidence was probably sufficient to support an action of another description; but the plaintiff was not bound to pursue it. *The plaintiff's wife was proved to have been repeatedly absent from his house, and in company with the defendant at his house, and in other places, under circumstances that could leave no doubt of her being enticed or persuaded away by the defendant.

[*462]

The judgment below must be affirmed.

NEW-YORK,
October, 1811.

WELLS
v.
LANE.

WELLS against LANE.

In an action under the act (sess. 24.c.188,) concerning slaves, for a penalty, for harboring the slave of the plaintiff, brought against a member of a religious society or sect, called *Shakers*, a member of that society is a competent witness, although the members hold all things in common, and have a partnership interest in all their concerns as a religious sect.

IN error, on *certiorari*, from a justice's court. *Lane* sued *Wells*, before a justice, for two *penalties*, of twelve dollars and fifty cents each, under the 14th section of the act concerning slaves and servants, (sess. 24. c. 188. [2 R. S. 158. sec. 25]) for harboring his slave *Betty*, on the fourth and fifth of November, 1810. The defendant pleaded, that *Betty*, the daughter of the plaintiff, was a member of the society of *Shakers*, and is a member of the society in which the defendant resides. That she became a member of the society, by the consent and request of the plaintiff, and by agreement between the plaintiff, the defendant, and *Betty*; and that she resided among the people called *Shakers*, by her own choice, without any compulsion. That she was of age and free, and not a slave, nor was the plaintiff her master, within the meaning of the act, nor had she been sold by fraud, nor liable to maintenance, as a pauper, &c.

The cause was tried by jury. On the trial, the plaintiff proved that he bought *Betty*, and that she was a slave as the witness had heard, and was born before the plaintiff had married her mother. That the plaintiff bought the mother and *Betty* as slaves. That *Betty* was at the house of the defendant, and the plaintiff had forbidden the defendant to keep her.

[* 463] *The defendant proved that the plaintiff said, he had bought *Betty* and her mother, to free them from slavery. The plaintiff proved that the *Shakers* were all in partnership, and had one common interest, as brothers and sisters. The defendant offered several members of the society, as witnesses, to prove the allegations contained in his plea; but the justice rejected the evidence of the *Shakers*, who were in full communion in their church. The jury found a verdict for the plaintiff, for twenty-five dollars.

Van Vechten, for the plaintiff in error.

Rodman, contra.

Per Curiam. The rejection of the witnesses offered by the defendant below, to prove the truth of his plea, was erroneous. Though the members of the society of *Shakers* may be partners in interest, as to their concerns, as a religious community, that copartnership cannot extend to the case of a penalty forfeited by either of the members, for a violation of

a penal statute; and the objection could only go to the credit, not to the competency of the witnesses offered. On this ground, and without examining further into the merits of the case, the judgment is erroneous, and must be reversed.

NEW-YORK,
October, 1811.
THE PEOPLE
v.
RUNKLE.

Judgment reversed.

*THE PEOPLE *against* W. RUNKLE.

[* 464]

AN indictment, for a forcible entry and detainer, was found the 19th *June*, 1810, against the defendant, and *John Runkle* and *John Bicker*, since deceased, under the third section of the "act to prevent forcible entries and detainers." (Sess. 11. c. 6. [2 R. S. 507. 511.])

The indictment stated, that the trustees of the *German reformed church* in the city of *New-York*, were seised in their demense, as fee simple, of and in a certain church, situate, &c., and in a certain school-house, situate, &c., with the appurtenances, and so continued, until *William Runkle*, minister of the gospel, *John Runkle*, minister of the gospel, and *John Bicker*, on the 13th *June*, 1810, with a strong hand, &c., entered the said church and school-house, and disseised and expelled the said trustees therefrom, &c.

The defendants traversed the indictment, and the same was removed, by *certiorari*, to this court. The cause was tried at the *New-York* sittings, before Mr. Justice *Thompson*, the 6th *June*, 1811.

The proceedings were commenced and prosecuted, at the instance, and under the direction of *Matthias Luff*, *George Gilfort*, *Ludowick Sherman*, and *Engle Frennd*.

La Forest, a witness, testified, that on the 13th *June*, 1810, in the afternoon, the church was opened, but by whom he did not know, and soon after, he saw *William Runkle* preaching in the pulpit. Besides the front door, there was a door leading to the house of the witness, which was nailed up, on the inside, the same afternoon. *John Gilfort* kept the key of the church, some months before. A number of people, on the 13th *June*, 1810, were seen at the side door of the church, and a blacksmith attempting to open the door, but by whom the door was opened, or whether from the inside or outside, the witness did not know. *William Runkle* was seen going into the church, in the same afternoon, and a man was seen taking the lock from the front door, who soon afterwards returned

On an indictment for the forcible entry and detainer of a church, &c. it was held, that trustees of a church, as such, can only be in possession constructively, and that the possession of the key of the church, by one of them, is *prima facie* evidence of possession; but it does not preclude all inquiry as to the fact, who were the legal trustees, at the time of the entry.

Trustees of a church, *qua* trustees, can have only a constructive possession, by reason of having the right of possession. (a)

[* 465]

(a) *Vide J. C. 9 Johns. Rep. 147.*

NEW-YORK,
October, 1811.

THE PEOPLE
v.
RUNKLE.

and put the lock on again. *William Runkle* gave directions to the blacksmith as to the lock, and said, from the pulpit, that the congregation had suffered nearly six months, for not having the church opened. The sexton locked the church, and took away the key. It appeared that the blacksmith was employed by the trustees, in the presence of *William Runkle*, to open the door, but not to use violence, and no force was used, nor any thing broken. It was also testified, that the front door was open when *William Runkle* entered the church. A witness testified, that, about five years before, *William Runkle* was called as a minister; and that the trustees had possession of the church for the congregation.

The counsel for the prosecution offered to prove, by parol evidence, that *George Gilfort, Lodowick Sherman, Matthias Luff* and *Engle Frennd*, were the trustees of the church. It was objected, that they ought first to prove the existence of a corporation, and that the persons mentioned were duly elected trustees according to the charter; but the objection was overruled by the judge, who ruled that it was sufficient, for the prosecutors that they were trustees *de facto*, and in possession of the church. That in a case of forcible entry and detainer, the only inquiry was, whether the party complaining was in possession of the property.

A witness was then called, who testified, that *Gilfort, Luff, Sherman, and Frennd* had been elected trustees in *June, 1808*, but he did not know who kept the key: it was sometimes kept by the trustees, and sometimes by the sexton.

[* 466]

The defendant then offered to prove, that there was no force used; that the defendant was pastor of the church in question, having been called by the congregation, and *continued their pastor, for some time, without opposition; that a majority of the congregation were desirous of his continuing their pastor, but were opposed by the trustees, who, finding that they could not discharge Mr. *Runkle*, by a majority of the congregation, had locked up the church; that by these irregular proceedings, the corporation was dissolved, and that, after its dissolution, the congregation incorporated themselves anew, and became entitled to all the property of the former corporation; that they ordered the church to be opened, and Mr. *Runkle* to renew his functions, but directed the man employed to open the church, not to use force. The evidence thus offered was rejected by the judge, and the jury found the defendant guilty.

A motion was made to set aside the verdict.

H. Bleeker, for the defendant. This is a prosecution by persons calling themselves trustees of a church, against their own minister, for a forcible entry into the church.

This case does not come within the purview of the statute, for the prevention of forcible entries and detainers. The statute has reference only to entries into private houses and tenements, in the actual possession of some persons, against whom force may be used. To constitute an offence within the statute, the entry must be with force and violence; there must be an act of outrage, and a putting of some person in fear of bodily harm. (*Hawk. P. C. c. 64. s. 1. 25. 27. Lambard*, 140, 141, 142.) There was no person in possession of this church, who could be put in fear. The possession of a church is only constructive and technical. It is true, there is a case in *1 Lev. 90*, of an indictment for a forcible entry into a parish church and parsonage house, but the facts and circumstances are not stated. There was no evidence that force was used in entering the church, nor any evidence of a forcible detainer; yet the verdict has found the defendant guilty of both. (4 *Johns. Rep.* 198.)

*2. It is not shown that the defendant was present when the force, if any, was used. If he had agreed that force might be used, yet if he was not present, but came afterwards, he cannot be charged under the statute. (*Hawk. c. 64. s. 24. Bac. Ab. Forcible Entry, &c. B.*)

[* 467]

3. There was no evidence of possession in the *ex trustees*: they held by virtue of their office; and if permitted, we might have shown them to be out of office. Their office was gone. This is not a case in which there can be a trustee *de jure*, and a trustee *de facto*.

4. If the defendant had been permitted to show that the prosecutors were not the trustees, he must have been acquitted. There can be no *pedis possessio* of the church; it depends upon the right. Admitting that the old trustees, after the dissolution of the corporation, held possession, yet it was a possession for the benefit of the new trustees.

5. The old trustees held in trust for the new corporation and the congregation. They had no right to shut the door of the church against the minister and congregation. The trustees have only the custody of the temporalities, for the use and benefit of the congregation. They have no right to judge of the fitness of the minister, and to exclude him and the congregation from the church. The trustees are not injured; there was no force or violence against them; (*Cro. Jac. 18. Hawk. c. 64. s. 32*;) they have the same custody and possession they had before; their right is not altered. The offence, therefore, contemplated by the statute, does not exist.

6. There was no proper evidence that the persons prosecuting were the trustees.

7. There was no evidence whatever of any entry into the school-house, yet the verdict was general, and restitution must

NEW YORK,
October, 1811.

THE PEOPLE
v.
RUNKLE

NEW-YORK, go to the whole. (*Sayer, 169. Bac. Ab. Forcible Entry, &c. G.*)

THE PEOPLE
v.
RUMBLE.

[* 468]

Harris and Henry, contra. There must have been force used in entering the church, as it was locked and fastened, expressly for the purpose of excluding the defendant. *The doors were locked and bolted, and the side door was forced open. (2 *Roll. Ab.* 2. 2 *Inst.* 235, 236.) But the jury have passed on the fact, and have found that there was a forcible entry. Churches and ecclesiastical possessions are as much the objects of that force which the statute has in view, as temporal property. (1 *Sid.* 101. 1 *Lev.* 90. *Hawk.* c. 64. s. 31.) There may be an indictment for a forcible entry into an incorporeal hereditament. (*Cro. Car.* 201. 486. *Dalton*: 315.) The possession of the trustees, who have been denominated *ex trustees*, was fully shown. They had all the possession of which the subject was susceptible. The key was in the possession of *Gilford*, one of the trustees. We deny that the corporation was dissolved: but that is a point which can not be inquired into in this case. The new trustees, in fact, have been incorporated under a different name.

[*SPENCER, J.* The only question is, who were the legal trustees.]

To say that the possession of the old trustees is the possession of the new, is begging the question as to the right of the new trustees. But the court cannot, on this indictment, inquire into title. Right or title to the property is no excuse. The statute was made to prevent persons from doing themselves right by force.

In *Jackson v. Nestles*, (*Johns. Rep.*) it was admitted, that there might be trustees *de jure*, and trustees *de facto*. This is not a case of a dissolution of a corporation, by failure of trustees; it is a contention between two sets of trustees.

A *cestui que trust* cannot bring an action of ejectment against his trustee, who has the legal possession. Supposing, then, that the old trustees held in trust for the minister and congregation, yet the latter cannot enter, by force, on the trustees. The old trustees have the legal estate, and are clothed with the possession by law.

[* 469]

Per Curiam. The indictment states, that *The Trustees of the German Reformed Church*, were seised of the *church, until the forcible entry charged, and by which they were dispossessed. It was, then, a material question, upon the trial, who were those trustees. If the persons who directed the church to be opened, and by whose permission the defendant entered,

were the legal trustees, there was no force. This fact the defendant offered to show, and it was overruled. There was no evidence that the prosecutors were such trustees, or had actual possession of the church, at the time, except what might be inferred from the fact, that they had been elected trustees in *June*, 1808, which was two years before the time in question, and that one of them kept the key for some months before. This was sufficient evidence, in the first instance, of possession, but it is not so conclusive as to preclude all inquiry into the fact who were the legal trustees in 1810. If those persons, by whose direction the defendant entered, were the trustees, the law would cast the possession of the church upon them. Trustees of a church, *qua* trustees, cannot be in possession, but constructively, by reason of having the right of possession. *Gilfort* might, as an individual, have had possession in fact, but the indictment does not charge the entry as upon him, but upon the trustees of the church; and the defendant ought, therefore, to have been permitted to have shown that the prosecutors were not the trustees.

Upon this ground, and without examining the other points that were raised, the verdict ought to be set aside.

NEW-YORK,
October, 1811

COBB
v.
CURTISS.

New trial granted.

***COBB against CURTISS.**

[*470]

IN error, on *certiorari*, from a justice's court.

Curtiss sued *Cobb*, before the justice, in *assumpsit*, for a breach of promise; and set out, in his declaration, that the defendant had, some time before, sued him before another magistrate, and that, before the return day of the summons he settled with him and paid him three dollars, in full, and the defendant promised to go to the magistrate, and pay the costs, but that instead of doing so, he appeared at the return of the summons, and obtained a judgment, for twenty-five dollars, against *Curtiss*.

The testimony introduced at the trial fully supported the and obtained a judgment by default, against *B.* for twenty-five dollars. *B.* then brought an action of *assumpsit* against *A.* before another justice, for a breach of the promise made by him, as to the former suit, and recovered. It was held, that the action was sustainable; it not being for the purpose of overhauling the prior judgment, nor to recover back money which the defendant had unconsciously received; but for a breach of the promise to discontinue the former suit, and pay the costs. *B.* was not bound to set off the demand for damages, for the breach of this agreement, in the suit carried on against him by *A.* contrary to his promise. (a) Where the justice himself is sworn as a witness, and no objection is made, at the time, it will be deemed, on the return of the *certiorari*, to have been admitted by consent.

A. sued *B.* before a justice, and before the return of the summons, *B.* settled with *A.* and paid him three dollars, in full, and *A.* promised *B.* to go to the justice and pay the costs; but instead of doing so, he appeared at the return of the summons

(a) *Vide White v. Ward*, 9 *J. L. Rep.* 232.

NEW-YORK, October, 1811. declaration. The justice himself was sworn, as a witness, but no objection was made, nor was any objection made to any part of the testimony. There was a judgment in favor of the plaintiff for twenty-five dollars, with costs.

Core
v.
Curriess.

Per Curiam. The suit here was not to overhale the first judgment, or to recover back the amount of it, on the ground that the money was not due, and had been unconscientiously recovered. That was not the *gist* of this action. The case of *Marriot v. Hampton* (7 *Term Rep.* 269) has no application. This suit was brought for breach of an agreement to discontinue the former suit, and this breach would be the same, even if the former recovery had been for a just debt.

Lord Chief Justice *Eyre*, in *Philips v. Hunter*, (2 *H. Bl.* 416,) though he denies the authority of *Moses v. M'Farlan*, yet he expressly admits that the recovery in the court of conscience, referred to in that case, was the breach of an agreement, and upon *that breach* an action *would have lain; and this, he said, was the party's proper remedy, and not an action for money had and received, to recover back the money which had been unconscientiously recovered, in the court of conscience. This case comes exactly within that rule. It was for a breach of a promise, that in consideration of paying three dollars, the defendant would go and discontinue a suit, pending before a justice. To deny an action for the breach of such an agreement, would be unjust. Nor was the plaintiff below barred of his action, for not having set off this demand in the suit so carried on against him, in defiance of the agreement. The set-off, in a suit before a justice, of any counter demand or account, must mean, as in cases of set-off in other courts, accounts or demands existing at the commencement of the suit, and the agreement here was subsequent, and so could not have been a legal set-off. It is a settled rule that no matter of defence, arising after action brought, can be pleaded in bar, or as a *set-off*. (3 *Term Rep.* 186. 4 *East*, 507. 1 *Caines*, 71, 72.)

The merits of this case are, therefore, strongly with the plaintiff below, and as the admission of the magistrate, as a witness, must be taken to have been, by consent, as no objection was made, there was no technical rule violated, and the judgment must be affirmed.

Judgment affirmed

NEW-YORK,
October, 1811.CANTILLON
v.
GRAVES.*CANTILLON, Administrator, &c. against GRAVES,
Sheriff, &c..

THIS was an action of debt, for the *escape* of one *Green*, in the custody of the defendant, as sheriff of the county of *Clinton*, on a *ca. sa.* issued against *Green*, at the suit of the plaintiff. The defendant pleaded that *Green*, on the first of *October*, 1810, broke the gaol, and escaped, against the will of the defendant; and afterwards, on the same day, and before the exhibiting the bill of the plaintiff, voluntarily returned into the gaol, and into the custody of the defendant, and continued in prison, in his custody, until the sixth day of *October*, 1810, when *Green* presented his petition to the Court of Common Pleas of the county of *Clinton*, with an inventory, &c. praying that an assignment of his estate might be made, that he be discharged from his imprisonment on the said execution, and that the said Court of Common Pleas, then and there, having full power and authority for the purpose, did order and assign a time for the said *Green* to be heard on his petition, according to the direction of the act (2 R. S. 28) for the relief of debtors, with respect to the imprisonment of their persons, to wit, the sixth *October*, 1810; and the said *Green* being brought into court, and having taken the oath prescribed in the said act, and the said court being satisfied that the proceedings, on the part of the said *Green*, were just and fair, did order his estate, &c. to be assigned, &c.; and the said assignment being then and there made by the said *Green*, &c. the said court having full power and authority for that purpose, did order the said *Green* to be discharged from his imprisonment on the said execution, &c.; and that the defendant being served with a copy of the order, discharged the said *Green*, &c. and that this is the same escape whereof the plaintiff complains, &c. wherefore, &c.

To this plea there was a general demurrer, which was submitted to the court without argument.

Per Curiam. The plea, even if it be defective in matter of form, (and in that view we have not examined it,) is good in substance, upon general demurrer. It is the same as the

client to show that the Court of Common Pleas had jurisdiction in the case, and that the discharge was a sufficient justification to the sheriff, who has no concern with the regularity of the proceedings before the court. (a)

(a) If a plea of a discharge under an insolvent act state enough to give the magistrate who granted it jurisdiction, and set forth the discharge itself, it will be sufficient without stating all the proceedings. *Hines v. Billard*, 11 *Jokas. Rep.* 491. *Roosevelt v. Kellogg*, 20 *Jokas. Rep.* 208. See *Frary v. Dakin*, 7 *Jokas. Rep.* 75, note (a).

In an action of debt against a sheriff, for the escape of *G.* a prisoner in his custody on execution, at the suit of the plaintiff, the defendant pleaded, that on the 1st *October*, 1810, *G.* escaped, against the will of the defendant, and that he returned into gaol, before the commencement of the plaintiff's suit, and continued in gaol until the 6th *October*, 1810, when he presented his petition to the Court of Common Pleas, &c. and was discharged out of custody on the said execution, by order of the Court of Common Pleas, having full power and authority for that pur-

[* 473]

pose, pursuant to the act for the relief of debtors, with respect to the imprisonment of their persons, (sess. 24. c. 66.) it was held, on general demurrer, that the plea was suffi-

NEW-YORK, second plea in the case of *Currie & Whitney v. Henry*. (2 Johns. Rep. 433.) It states enough to show that the Court of Common Pleas had jurisdiction in the case of the prisoner, and their discharge was a justification to the defendant, as sheriff. He had no concern with the regularity of the proceedings before the court. It was enough that the prisoner charged in execution for the sum mentioned, presented a petition and inventory to the court, and prayed that he might be discharged from imprisonment in that case, and that the court did take cognisance of the petition, according to the directions of the statute named, and that they had authority for that purpose, and that the prisoner was discharged, &c.

SLINGER-
LAND
V.
MORSE.

Judgment for defendant.

[* 474]

*SLINGERLAND *against* MORSE and others.

A. having dis-
trained the
goods of *B.*, to
wit, horses and
household furni-
ture, for rent,
C. promised to
deliver the
goods to *A.* in
six days, or pay
450 dollars, and
the goods were
left in the pos-
session of *C.*
A. demanded
the goods with-
in the six days,
but did not de-
signate any
place at which
they were to be
delivered, and
immediately af-
ter, and within
the six days, went with *C.* to the house of *B.*, where the goods were; and *C.* there tendered the goods to *A.* who said that he was not ready to receive them, but that if *C.* would carry the goods to *D.*, *A.* would receive them, but *C.* refused to do so.

In an action of *assumpsit*, by *A.* against *C.*, it was held, that the reply of *A.* to the offer of *C.* to deliver the goods to *A.* at *B.*'s house, dispensed with any further tender or delivery on the part of *C.* especially as the articles were bulky and numerous.

There is a difference, in regard to tender, between things portable and things ponderous. If no place be appointed for performance or payment, a tender to the person who is to receive is sufficient.

Such a tender and refusal are a complete bar to the suit on the contract; and the plaintiff must resort to the person in whose possession the goods are, and who holds them as his bailee, and at his risk. (a)

(a) The principles adopted in this case and in *Coit v. Houston*, 3 Johns. Cas. 243, have since been fully recognised in numerous instances; more especially in *Barns v. Graham*, 4 Cowen, 452. *Lobdell v. Hopkins*, 5 Cowen, 516. *Sheldens v. Skinner*, 4 Wendell, 525. *Lush v. Druse*, Id. 313. *Goodwin v. Holbrook*, Id. 377. *La Farge v. Rickers*, 5 Wendell, 187.

OF THE STATE OF NEW-YORK.

41

deliver the articles, according to their promise, and did tender the same, and that the plaintiff refused to accept them; and that the plaintiff, after the expiration of the six days from the time of the demand, seized and took the articles into his own custody, for rent.

The cause was tried at the *Saratoga* circuit, in *May* last, before Mr. Justice *Spencer*.

At the trial, the plaintiff gave in evidence the promise, dated the seventh of *June*, 1809, signed by the defendants, on the back of the notice to *Fitzgerald* of *the distress, by which the defendants promised to deliver to the plaintiff the goods, in the notice specified, in six days after demand, or pay four hundred and fifty dollars. The plaintiff further proved, that the property was distrained, but not removed, or delivered to the defendants; and that on an adjourned day for the sale of the goods, the defendant, at the solicitation of *Fitzgerald*, signed the agreement, and the plaintiff left the property at the house of *Fitzgerald*. That on the eighth or ninth day, after the date of the promise, the plaintiff went to each defendant, and demanded the goods, whereupon the defendants went to the house of *Fitzgerald*, where they met the plaintiff, and the defendants said they were willing to deliver the goods which were then there, and the plaintiff replied he was not prepared to receive them, but came to give notice; but if the defendants would carry them to Major *Canute*'s, he would receive them. Five or six days after, the plaintiff went to the house of each defendant, for the goods, and all of them were absent from home, except *Morse*, who declared that he would do no more. Two or three days after, the plaintiff went to *Fitzgerald*, and demanded the goods, and he refused to deliver them.

The defendants offered to prove, that at the time of the demand, the plaintiff and the defendants went to the house of *Fitzgerald*, (where the goods were, and had remained since they were distrained,) and offered and tendered the goods to the plaintiff, who refused to receive them; and that the plaintiff declared to *Fitzgerald*, that he did not mean to take the property from him; that all he intended was to fix the defendants, and make them liable. This evidence was overruled by the judge, and a *bill of exceptions* tendered. The jury, under the direction of the judge, found a verdict for the plaintiff for five hundred and fifteen dollars and fifteen cents.

The case on the bill of exceptions was submitted to the court without argument.

**Per Curiam.* The facts offered to be proved by the defendants would have made out a complete defence. It is

NEW-YORK,
October, 1811.

SLINGER-
LAND
v.
MORSE.

[* 475]

[* 476]

NEW-YORK,
October, 1811.

SLINGER-
LAND
v.
MORE.

very questionable, whether the plaintiff's own proof was not fatal to him; but the evidence offered by the defendants would have been more full, and have shown the acts of the parties with greater precision and certainty.

Two questions arise upon this case; 1. Whether the testimony given and offered did not make out a valid tender of the goods; 2. If it did, then what was the effect of such tender and refusal upon the plaintiff's right of action?

1. Here was to be a delivery of cumbersome specific articles, and, by the contract, no place was appointed for the delivery. They were to be delivered within six days after the demand, and the plaintiff makes the demand, and does not designate the place. The parties immediately after this demand, and within the six days, meet at the house of *Fitzgerald*, where the goods were, and the defendants there offered the goods, and the plaintiff refused to accept of them, or, according to the plaintiff's own proof, the defendants then declared they were willing to deliver the goods, and the plaintiff replied that he was not prepared to receive them, and appointed a different place, where he would receive them. This answer of the plaintiff was a dispensation from any further effort to make a tender. Any other offer was not requisite, especially considering the nature of the articles. The articles were numerous and bulky, and there was an offer to deliver, and that was enough. In *Stone v. Gillian*, (1 *Show.* 144,) it was admitted, that there was a difference in the act of tender, between cumbersome and portable articles. A waiver of any further tender by the declaration, or equivalent act of the creditor, will excuse an actual offer, even in the case of money. (3 *Term Rep.* 683. 10 *East*, 101. 5 *Tyng*, 67.) But whatever difficulty there might be, as to the fact of a tender, if it depended solely upon the plaintiff's evidence, the defendants offered to prove *an absolute tender, and that proof ought to have been received. Upon this case, then, and for the purpose of testing the materiality of the testimony, we are to consider the tender as duly proved, and then the question is, whether the defendants were entitled to make the tender. And upon this point, we do not perceive any ground, either in reason or authority, upon which to question the right. The general rule is, that if no place be appointed for payment or performance, a tender to the person is good, and this, too, in cases in which a personal tender was not required, as of rent issuing out of land. (17 *Ass.* pl. 2. *Bro. tit. Condition*, pl. 103. *Cro. Eliz.* 48.) Lord *Coke* says, (*Co. Litt.* 210. b,) that "if the condition of a bond or feoffment be to deliver twenty quarters of wheat, or twenty loads of timber, or such like, the obligor or feoffor is not bound to carry the same about and seek the seofee, but the obligor or feoffor, be-

fore the day, must go to the feoffee, and know where he will appoint to receive it, and there it must be delivered. And so note a diversity between money and things ponderous." This provision is evidently made for the ease and favor of the obligor, and to save him from the burden of seeking the obligee with the ponderous articles. If, then, he and the creditor should happen to meet, at the place where the articles were deposited, and after the delivery had been demanded, he is entitled to deliver them at such place; such a delivery is in coincidence with every principle of law. It is a delivery to the person, and at the place where the articles were left or existed at the time of the contract. In this instance, there was a peculiar fitness in the place of the tender. The plaintiff had distrained the goods at the place, and left them there, in the first instance, in possession of *Fitzgerald*. They were afterwards taken into the custody of the defendants for safe keeping, and who engaged to see them forthcoming upon demand. The parties, after the *demand, met at this very place, and on this very subject. For the plaintiff to refuse a tender there, and to require it to be made at a different place, was not agreeable to the spirit of the contract, and was arbitrary and unreasonable. The defendants were entitled, at that moment, to deliver themselves of the burden; and if they exercised the right which the law gave them, the plaintiff refused, at his peril.

2. The next question is, what effect this tender would have upon the action? We consider it as a complete bar to the suit upon the contract. If a man be bound to pay one hundred quarters of wheat, and he tender it, at the day, he need not plead *uncore prist*, for the corn is *bonum peritum*, and it is a charge for the obligor to keep it. (Co. *Lit.* 207. a. *Peytoe's case*, 9 *Co.* 79. a.) So it was held, still more early, (20 *Edw.* IV. 1 *Bro.* tit. *Tout Temps Prist*, pl. 31,) that if an obligation be to enfeoff the plaintiff, by a day, or to deliver him a horse, tender and refusal is a bar for ever. The delivery of the goods was a thing collateral to the obligation, as the books term it, and, by tender and refusal, the plaintiff shall never be entitled to the money. Here was no *precedent debt or duty*. He must resort to the specific articles tendered; and the person in whose possession they are, holds them as his bailee, and at his risk. This effect of a tender and refusal, correctly made, of a specific article, is analogous to the effect of a *consignation* under the *French* law. (*Pothier, Traité des Obligations*, No. 545.)

We are of opinion, that the verdict be set aside, and a new trial awarded, with costs to abide the event of the suit.

NEW-YORK
October, 1811

SLINGER
LAND
V.
MORSE

[*478]

(a) See S. C.
7 Johns. Rep.
463.

New trial granted. (a)

367

NEW-YORK,
October, 1811.

JACKSON
v.
KETCHUM.

*JACKSON, *ex dem.* BRYANT, against KETCHUM and
another.

A. in an action of ejectment, for land in *Brunswick*, in the county of *Rensselaer*. The cause was tried, at the *Rensselaer* circuit, on the 5th June last, before Mr. Justice *Spencer*.

Both parties claimed to hold under *Norris Pearce*. A judgment was recovered the 29th February, 1808, by *James Cox* against *Norris Pearce*, an absconding debtor, on which a *fi. fa.* was issued, by virtue of which the sheriff sold the premises in question, and executed a deed for the same, to *Cox*, dated the 22d August, 1808. *Cox* gave a deed of *quit-claim* for the same land, to the lessor of the plaintiff, dated 14th July, 1810.

In July, 1810, *B* executed a *quit-claim* deed for the same land, for the consideration of 300 dollars, to *C.*, who knew, at the time, of the suit, trial and verdict, respecting the land.

It was held, that the deed from *B.* to *C.* was void under the first section of the "act to prevent and punish chancery and maintenance."

(*Sess. 24. c. 87.*)

The purchase of land, during the *pendency* of a suit concerning it, if made with a knowledge of the suit, and not in consummation of a previous bargain, is *chancery*, though not punishable under the statute, for selling a *pretended title*.

[* 480]

(a)

not in consummation of a previous bargain, is *chancery*, though not punishable under the statute, for selling a *pretended title*.

The defendants gave in evidence the record of a judgment, in an action of ejectment, brought on the demise of the defendant against *Jacob Whyland* and *James Cox*, junior, for the same premises, and which was tried, at the *Rensselaer* circuit, in June, 1810, when a verdict was found for the plaintiff, and a judgment entered thereon, in August term, 1810.

It was admitted, that that suit involved the same questions as arose in the present, as to the premises, which were worth 2,500 dollars; and that *Bryant*, the lessor of the plaintiff, bought the premises of *Cox*, for three hundred dollars, *knowing* at the time, of the former suit, trial and verdict. It was then objected on the part of the defendants, that the deed from *Cox* to the lessor, was inoperative and void; but the judge overruled the objection.

The defendants then gave in evidence, an attachment issued the 5th May, 1808, against the real and personal estate of *Pearce*, as an absconding debtor, and the proceeding under the act for relief against absconding and absent debtors, and a deed for the premises in question, from the trustees appointed pursuant to the act, to the defendant *Ketchum*, dated the thirtieth December, 1808.

The defendants also produced evidence, which it is not necessary to detail, to show that the judgment in favor of *Cox*, against *Pearce*, which had been entered up by virtue of a warrant of attorney, and under which the premises were sold, had been fully satisfied, before the execution and sale

(a) Vide 2 R. S. 691. & 5. 6. *Thalimer v. Brinkerhoff*, 20 Johns. Rep. 386. S. C. 3 Cowen 623. *Cloves v. Hawley*, 12 Johns. Rep. 484.

under it; and one witness testified, that when the attachment was levied on the property of *Pearce*, *Cox* was present, and did not assert any claim under the judgment; but said that "he was sorry for *Pearce*, and had a mind to save the property for him, and that as he had not discharged the judgments he had obtained against *Pearce*, on record, he could have the property sold under them and save it for *Pearce*." This was, however, contradicted by *Cox*, who was sworn as a witness on trial.

The judge charged the jury, that the plaintiff had made out a good paper title, in the first instance; but if the jury believed that the judgment against *Pearce*, in favor of *Cox*, under which the premises had been sold, by the sheriff to *Cox*, had been satisfied, at the time of the issuing the execution, the defendants would be entitled to a verdict, otherwise they ought to find for the plaintiff. The jury found a verdict for the plaintiff.

A motion was made to set aside the verdict and for a new trial.

Foot, for the defendants. The deed from *Cox* to *Bryant* was void. It was the sale of the subject matter of the suit, then pending, and while the grantor's right was in litigation. The *English* statutes of *Westm.* 1. c. 25. *Westm.* 2. c. 49. and 28 *Edw.* 1. c. 11, from which our act relative to maintenance has been extracted, were declaratory of the common law. They prohibit all persons from taking, or receiving, by gift or purchase, lands, &c. while a suit *is pending. (*Hawk. P. C.* b. 1. c. 84. s. 2. 10. 13. 4 *Bac. Abr.* 494. tit. *Maintenance. Co. Litt.* 368. b. 369. a.) A lease for life, or years, or a voluntary gift of the subject matter, pending the suit, is as much within the statute, as a purchase for money. And it has been held that the purchase of land, *pendente lite*, was *champerty*, and, as such, within the statutes. (*Moore*, 655.) The only cases which are considered as exceptions, or not within the statute, are where the conveyance is made *bona fide*, for a valuable consideration, and without notice, or in pursuance of a previous contract. (*Hawk. P. C.* b. 1. c. 84. s. 14. 2 *Inst.* 563. *Fitz. Nat. Brev.* 172. tit. *Champ.* pl. 15. 2 *Roll. Abr.* 113.)

[* 481 !

Russell, contra, contended, that the deed was valid at common law, and not within the statute against *champerty*. A verdict in *ejectment* concludes nothing, except as to the *mesne* profits. The first section of our act applies only to the case of a purchase made with a view to defeat the very action pending. *Hawkins* (*Hawk. P. C.* c. 86. s. 1) speaks of the purchase of doubtful titles, in order to aid a suit pending relative to such title; and he seems to think it makes no differ-

NEW-YORK,
October, 1811.

JACKSON
v.
KETCHUM

NEW-YORK,
October, 1811.

JACKSON
v.
KETCHUM.

ence whether the party selling is in possession, or not. But the authorities (*Moore*, 751. *Hob.* 116. *Plowd.* 80) he cites do not bear him out in that position; for in all of them the party selling was out of possession. The question here is, whether a person legally in possession of land, and having a legal title, cannot sell that land, merely because a person, without title, has thought proper to bring an action of ejectment against him. If this deed was valid at common law, it is not made void by the statute, which merely adds a penalty. The price for which the land sold does not affect the question as to the right to sell. *Blackstone*, (4 *Black. Com.* 133, 134,) in treating of *maintenance* and *champerty*, takes no notice of this offence.

It is not pretended that *Bryant* made the purchase, with a view to interfere with the suit then pending between the defendant and *Cox*. The intent, as to the purchase, was a matter of fact for the jury to decide. *There was, in fact, no intermeddling, on the part of the present lessor, with that suit. Must a person, who has an undoubted title to land, and which has been possessed by him and his ancestors, for a century, be prevented from selling it, because some person has brought an ejectment against him? It was once an offence in *England*, (4 *Black. Com.* 135,) to sell or purchase a bond or other *chose in action*; but now it is the general practice, and has been sanctioned by our courts.

[* 482]

Henry, in reply, observed, that the inquiry was not whether the deed from *Cox* to the lessor was void, under the eighth section of the statute, which prohibits the buying of pretended titles; but whether it was not *champerty*, and within the first section of the statute. A person who purchases a thing, knowing it to be in suit, does it, either for the purpose of bringing a suit, or defending one, which is the very thing the statute means to prevent, the buying up rights of action. Suppose *Cox* had been turned out of possession, by the ejectment suit against him, he could not then have sold. Now, he does the same thing circuitously; and for the purpose of becoming a witness in the suit brought by his grantee. The *English* statute of 28 *Edw.* I. c. 11, called *articuli super chartas*, is general, extending to all persons, and to all actions real, personal, and mixed. It has been held that if a tenant, pending a suit, grant rent out of the land, it is *champerty*. (2 *Inst.* 533.) In equity, the parties cannot alter the state of the matter in controversy, pending the suit. The position laid down by *Hawkins*, is established by all the authorities; and the only exception is, where the sale is in pursuance of a previous contract, or to pay an honest debt. *Fitzherbert*, it is true, says, that a *bona fide* purchaser, without notice, is not

within the statute. The *bona fides* must be decided by a jury, who must be satisfied that there is no *champerty*, or violation of the statute.

NEW-YORK,
October, 1811.

JACKSON
v.
KETCHUM.
[* 483]

**Per Curiam.* The principal question is, whether the deed from *Cox* to *Bryant* is not void. It was executed on the fourteenth *July*, 1810. It was a quit-claim deed, and for the consideration of three hundred dollars, and it, purported to convey lands worth 2,500 dollars. A verdict in ejectment for the lands in question, had passed against *Cox*, at the circuit court, in *June*, preceding the sale, and *Bryant*, at the time of the purchase, knew of the trial and verdict.

Upon these facts, we consider the deed to be void, under the act to *prevent and punish champerty and maintenance*. (*Laws*, vol. 1. 343. [2. R. S. 691. s. 56.]) The first section declares, "that no officer or other person shall take upon him any business that is or may be in suit in any court, for to have part of the thing in plea or demand, and no person upon any such agreement shall give up his right to another, and every such conveyance or agreement shall be void." This provision contains the substance of the *English* statutes of *West.* 1. c. 25. *West.* 2. c. 49. and 28 *Edw.* I. c. 11. on this very point. The statute of *West.* 1. enacted that *no officer, &c. should maintain pleas, &c. hanging in the King's Courts for lands, &c. for to have part or profit thereof by covenant made, &c.* The statute of *West.* 2. extended also to the public officers of justice; but the 28 *Edw.* I. enacted that *no officer nor any other, for to have part of the thing in plea, should take upon him the business that is in suit, nor upon any such covenant shall give up his right to another, &c.* Our statute is nearly *verbatim* with the last, which also embraced the substance of the other two, and it undoubtedly never meant to weaken the force, or destroy the application of the decisions under those ancient statutes, and which had become incorporated into the body of the common law. Our act has even a more explicit provision than these *English* statutes, when it declares, "that every such conveyance and agreement shall be void." The established doctrine, under these statutes, is, *that a purchase, or even a gift, of the land, while a suit is pending concerning it, if it be made with knowledge of the suit, and be not the consummation of a previous bargain, nor founded on the ties of blood, is within the purview of those statutes. (*Hawk.* b. 1. c. 84. tit. *Champerty.* 2 *Inst.* 563, 564.) It is, in the language of our statute, the "giving up his right to another," when that right is "in plea or demand." In *M.* 8 *Edw.* IV. 13. b. it was held by the justices, that a sale or gift of lands, pending the suit, was within the statutes, for the law prohibited every one from purchasing pending the suit. Even a

[* 484]

NEW-YORK, *bona fide* purchase pending the suit, was held by all the ser-
October, 1811. jeants, in 50 *Ass.* pl. 3, to be champerty; for, by intendment
of law, the purchaser must and would aid the suit, to save
himself from loss. So strict was the ancient law on this sub-
ject. Though this point is sought to be questioned, so far as
misdemeanor and punishment are involved, yet the policy of
the law may well require that every such conveyance be ad-
judged void. In *Mowse, v. Weaver and Postern*, (*Moore*, 655,) the
same doctrine was held, that the purchase of land, during
a *lis pendens*, was champerty, within the purview of those
ancient statutes, though not punishable under the 32 *Hen.*
VIII. made against selling pretended titles. There is, indeed,
no case that holds such a purchase valid, except in particular
instances, where there is no ground for the inference of champ-
erty; as where a man delivered seisin, after suit brought, in
consequence of a previous bargain. (*Fitz.* tit. *Champerty*;
pl. 15.)

[* 485]

The present case is stronger than any to be met with in the
books. It is too gross and palpable a violation of the statute,
to uphold a doubt as to the *mala fides* of the transaction.
The purchase and quit-claim, for less than one eighth of the
value of the land, and after the knowledge of the verdict in
ejectment against *Cox*, are circumstances that mark this
case, and render the conclusion of law upon the facts inevitable.

The verdict must, therefore, be set aside, and a new trial
awarded, with costs, to abide the event of the suit.

New trial granted

372

NEW-YORK,
October, 1811.SANDERS
v.
BACON.SANDERS and OGDEN *against* BACON and another.

IN error, from the Court of Common Pleas of *Saratoga* county. The plaintiffs in error brought an action of *assumpsit* against the defendants in the court below. The declaration was in the usual form, on a promissory note under the statute. At the trial of the cause, the plaintiffs gave in evidence a note, signed by the defendants, as follows: "For value received, we, jointly and severally, promise to pay *Barent Sanders* and *Isaac Ogden*, or order, the sum of ninety dollars and seventy-one cents, with interest, on or before the fifteenth of *September* next. Witness our hands this fourth day of *December*, A. D. 1806." On which note was an endorsement, also signed by the defendants, as follows: "The within obligation is to be delivered to *Messrs. Sanders & Ogden*, as a consideration for a judgment and execution for ninety dollars and seventy-one cents, in favor of *Sanders & Ogden* against *Salmon Tryon*, and by said *Sanders & Ogden* to be assigned, fully, legally, and effectually, over to the subscribers. *Ballston*, fourth *December*, 1806."

The defendants moved for a nonsuit, on the ground that, by reason of the endorsement, the note could not be declared on as a promissory note, within the statute. And the court nonsuited the plaintiffs. The plaintiffs tendered a bill of exceptions to the opinion of the court below, on which the writ of error was brought to this court.

*The cause was submitted to the court, without argument.

Per Curiam. The note was well declared upon, as a promissory note within the statute. It had all the requisites of such a note. The endorsement upon the back of it was no part of the note, and the effect of it was only to show the consideration, and to operate as a notice to any person who might purchase the note. If the plaintiffs were bound to have shown, in the first instance, the performance of that consideration, the objection ought to have been raised at the trial. The decision turned upon another point, and the intendment from the record would be, that the consideration was admitted, as no objection was raised upon that account. But if it had been raised, it could not have been valid. The delivery of the note was presumptive evidence of the assignment of the judgment, and it stood good, until overthrown by proof, on the part of the defendants, to the contrary. If the assignment was prospective, and to be thereafter made, the delivery of the note was

Where *A.* gave to *B.* a promissory note payable to *B.* or order, and at the same time made an endorsement on the note, that it was to be delivered to *B.* in consideration of a judgment against *C.* to be assigned to *A.* by *B.* it was held that the note was a promissory note, within the statute, and might be declared on as such, notwithstanding the endorsement, which was merely to show the consideration, and to operate as a notice to whoever might purchase the note; and that the delivery of

[* 486]
the note was
prima facie ev-
idence of an
assignment of
the judgment.

NEW-YORK,
October, 1811.

JACKSON
v.
VAN SLYCK.

equally so. The note was *to be* delivered, upon a judgment *to be* assigned, and the subsequent delivery was presumptive evidence of the subsequent assignment. They were to be concurrent acts. The decision below was, therefore, upon every view of the case, erroneous, and the judgment must be reversed; and the plaintiffs are at liberty to proceed, if they shall elect so to do, upon a *venire de novo*, to be awarded from this court.

Judgment reversed.

[* 487]

*JACKSON, *ex dem.* KEMBALL, *against* VAN SLYCK.

An equitable title or interest, as a resulting trust, cannot be set up as a defence in an action of ejectment against the legal title. (a)

THIS was an action of ejectment, brought to recover the easterly half of the westerly quarter of lot No. 41, in Springfield patent. The cause was tried at the Otsego circuit, in June last, before Mr. Justice Van Ness.

The plaintiff gave in evidence a deed for a piece of land, including the premises in question, dated in June, 1803, from *Julius Shaw* to the lessor; subject to a previous mortgage from *Shaw* to *John White*, dated thirteenth of January, 1802. The lessor took possession of the land under his deed, and continued possessed about two years, when the defendant entered, and has remained in possession since. The plaintiff offered to prove, by *parol*, that both the lessor and defendant had said, that the defendant took possession under a deed from the lessor to him, and claimed title under the lessor, subject to the same mortgage. This evidence was objected to, and overruled by the judge.

It was proved by the defendant, that the lessor had said that he had agreed to purchase of the defendant a tract of land, including the premises in question; and that the premises, with other lands, had been sold by virtue of a mortgage executed by *Shaw* to *White*; that he, the lessor, had taken a deed from *White* for the lands mortgaged; and that he had acted for the defendant, in making the purchase, and that part of the money had been paid by the defendant; and that to serve the defendant, he, the lessor, had taken much pains to procure the residue of the money to pay *White* what was due on the mortgage, &c. It was admitted that the mortgage and the sale under it, were regular.

[* 488]

The defendant offered to prove, by *parol*, that he had *paid about eighty dollars of the purchase-money to *White*, and that

(a) *Vide Jackson v. Dodge*, 3 Johns. Rep. 422. *Sinclair v. Jas. Jr.* 543. *Jackson v. Parkhurst*, 4 Wendell, 308. *Robinson v. Campbell*, 3 Wheat. 272.

the lessor, in making the purchase, acted as his agent, and for his benefit, &c.; which evidence was objected to, and overruled by the judge. It was admitted that the purchase by the lessor was made with his own money, except about eighty dollars, paid by the defendant.

The jury, under the direction of the judge, found a verdict for the plaintiff.

A motion was made to set aside the verdict, and for a new trial. The cause was submitted to the court, without argument.

Per Curiam. Whether the lessor of the plaintiff purchased the premises, with the money of the defendant, and so became seised for the defendant, in consequence of the resulting trust, is not a material inquiry in this case. Admitting the fact, which was offered to be proved by parol, (and this admission is more than the proof warranted,) the plaintiff was entitled to recover, because a court of law can look only to the legal estate. An equitable interest cannot be set up in ejectment, as a defence against the legal title. This is a well established principle. (*Jackson, ex dem. Potter, v. Sisson*, 2 Johns. Cas. 321. *Jackson, ex dem. Smith. v. Pierce*, 2 Johns. Rep. 231, and the authorities there referred to.)

Motion denied.

NEW-YORK,
October, 1811.

JACKSON
v.
LAIRD.

*JACKSON, *ex dem. GARDNER and others, against LAIRD.* [*489]

THIS was an action of ejectment, for lot No. 87, in the township of *Camillus*. The cause was tried, at the last *Onondaga* circuit, and a verdict was found for the plaintiff.

A motion was made, in behalf of the defendant, to set aside the verdict and for a new trial, on the discovery of new and material evidence.

It appeared, from the affidavits which were read, that *Eden B. Cornwell* and *Leonard Barton* claimed title to the land; that the defendant was their tenant, and had been in possession about five years; and that *Cornwell* had the care and management of the defence of the suit.

defence of the suit, and was present at the trial; that *F.* was a witness at the trial; not know, until after the trial, that *F.* knew or could testify the facts, stated as material; though it appeared that *B.* the tenant, who was not present at the trial, did know, before the trial, what *F.* could testify. A new trial was granted, as the evidence stated was material, and the suit being to change a possession of several years. (a)

(a) See the opinion of the court in *Jackson v. Crosby*, 12 Johns. Rep. 354. See also *Jackson v. Hooker*, 5 Cowen, 207.

NEW-YORK,
October, 1811.

JACKSON
v.
LAIRD.

The lessor of the plaintiff claimed title under one *George D. Rotter*, or more commonly called *De Rotter Gardner*, the soldier to whom the lot was patented; and he proved that he was a black man and had lived in *Exeter*, in *Rhode Island*, and enlisted in Col. *Green's* regiment; and that when the army was at *White Plains*, he left the *Rhode Island* regiment, and enlisted in the *New-York* line, as the witness had heard, &c. and that he died in *Exeter*, and that the lessors were his children.

Cornwell, in his affidavit, swore, that though *Andrew Fink* was a witness, at the trial of the cause, yet he did not know that *Fink* knew, or could testify, any thing material in the cause, until after the trial. But it appeared from the affidavits read on the part of the lessor, that the defendant, who was not however present at the trial, knew before the trial what *Fink* could testify.

[* 490]

Fink, in his affidavit, swore, that he was a captain in the first *New-York* regiment, in the revolutionary war; and that he enlisted *George De Rotter*, as a private in his company, at *Warenburgh*, the eleventh *March*, 1776, and **De Rotter* was a man of brown complexion, with black eyes and black hair, and was born at *Rhode Island*, &c. as appeared from the enlistment roll, in the witness's possession, and that he died, at *Saratoga*, in *January*, 1777.

Per Curiam. The testimony of *Fink* is material, to prove that the ancestor of the lessors of the plaintiff is not the soldier who drew the lot, and that they have no title.

It is true, that *Fink* was present at the trial, and that the defendant knew beforehand what he could prove. But the defendant was not present at the trial, and was a tenant under *Cornwell* and *Barton*, to whom he had abandoned the defence; and *Cornwell* swears, that he knew nothing of this testimony until after the trial. The suit is to change a possession of several years' standing, and that is an auxiliary consideration in support of the motion. The motion is therefore granted, on payment of costs.

NEW-YORK,
October, 1811

JACKSON

v.

SWARTWOUT.

JACKSON, *ex dem.* ROBICHEAU and others, *against*
SWARTWOUT.

THIS was an action of ejectment, for part of lot No. 74, in the town of *Hector*, and was tried at the last *Seneca* circuit, before Mr. Justice *Yates*.

The plaintiff gave in evidence an exemplification of an award of the *Onondaga* commissioners, dated the twenty-ninth *December*, 1800, awarding the lot in question to *John Currie*, one of the lessors. The defendant proved that the lot was vacant, that no possession was taken, until the year 1805; and offered to prove a title from the patentee, adverse to that of the plaintiff on which the award was made; but there being no evidence of any dissent having been filed, nor any produced, the judge overruled the evidence, holding the award as conducive against the defendant; and, under his direction, the jury found a verdict for the plaintiff.

*A motion was made to set aside the verdict, and for a new trial, which was submitted to the court without argument. [* 491]

Per Curiam. This case comes within the decision of *Jackson, ex dem. Cornelius, v. M'Kee*, (*ante*, p. 429.)

As no dissent was ever filed, the title under the award was final and conclusive. The motion is, therefore, denied.

Motion denied.

An award of the *Onondaga* commissioners, under the act (sess. 20. c. 51.) is final and conclusive, if no dissent has been filed, though the land was vacant, for five years after; and the party against whom the award was given, brought his action soon after possession was taken.

NEW-YORK,
October, 1811.

ROBERTSON

v.

COL. INS. CO. ROBERTSON against THE COLUMBIAN INSURANCE COMPANY.

A vessel was insured from New-York to Teneriffe, at a premium of $5 \frac{1}{2}$ per cent. and for an additional premium of $\frac{1}{2}$ per cent. permission was given to proceed from Teneriffe to the Isle of May and Bonavista, and at and from thence to New-York, to return one per cent. if the vessel did not proceed to Bonavista, and the risk ended safely.

[* 492]

The vessel arrived at Teneriffe, but was refused permission to enter or land any part of the cargo, until after performing a quarantine of 40 days, because her bill of health was not signed by the Spanish consul at New-York; and that if it had been so certified, the quarantine would have been only eight days. The master wrote to the consignee on shore, and by his application obtained permission, on the seventeenth of October, to land the corn, which composed part of the cargo; but the weather was so bad that nothing could be landed, until the thirtieth of October, on which day the government at Teneriffe prohibited all vessels from New-York from entering and landing their cargoes, unless their bills of health were certified by the Spanish consul. The master of the *Ohio* then determined to seek another port, and on the thirty-first of October proceeded to Madeira, which was the nearest port, where he arrived on the fourth of November, and landed and sold the cargo. The vessel afterwards proceeded to the Isle of May, and sailed from thence for New-York, on the thirty-first land his cargo, and there sold and delivered the cargo, and then proceeded to the Isle of May, and there took in a cargo, and arrived at New-York; but having suffered damage by the perils of the sea, on her voyage home, an action was brought on the policy to recover a partial loss: it was held, that the going from Teneriffe to Madeira was a *deviation*, but that the insured were entitled to a return of premium of one per cent. that part of the voyage to Bonavista never having commenced. (a)

(a) Necessity alone can sanction a deviation in any case, and that deviation must be strictly commensurate with the *vis major* producing it. *Maryland Ins. Co. v. Le Roy*, 7 Cranch, 22.

of December, 1809. During her passage, she met with very bad weather, which much injured the hull, sails and rigging, and sustained further injury by striking on a shoal near *Great Egg Harbor*, on the sixth of *February*; and on the eighth of *February*, 1810, she arrived at *New-York*.

The present action was brought to recover a partial loss on the vessel; and a verdict was taken for the plaintiff, subject to the opinion of the court, on a case agreed upon by the counsel.

The case was argued by *Colden* and *Sampson*, for the plaintiff, and by *S. Jones, jun.* and *C. I. Bogert*, for the defendant.

The only question argued was, whether there had not been a deviation.

The plaintiff's counsel cited *Scott v. Thompson*, (1 *New Rep.* or 4 *Bos. & Pull.* 181,) *Suydam & Wyckoff v. The Marine Insurance Company*, (2 *Johns. Rep.* 138,) **Reeve and another v. The Commercial Insurance Company*, (3 *Johns. Rep.* 352.)

NEW-YORK,
October 1811.

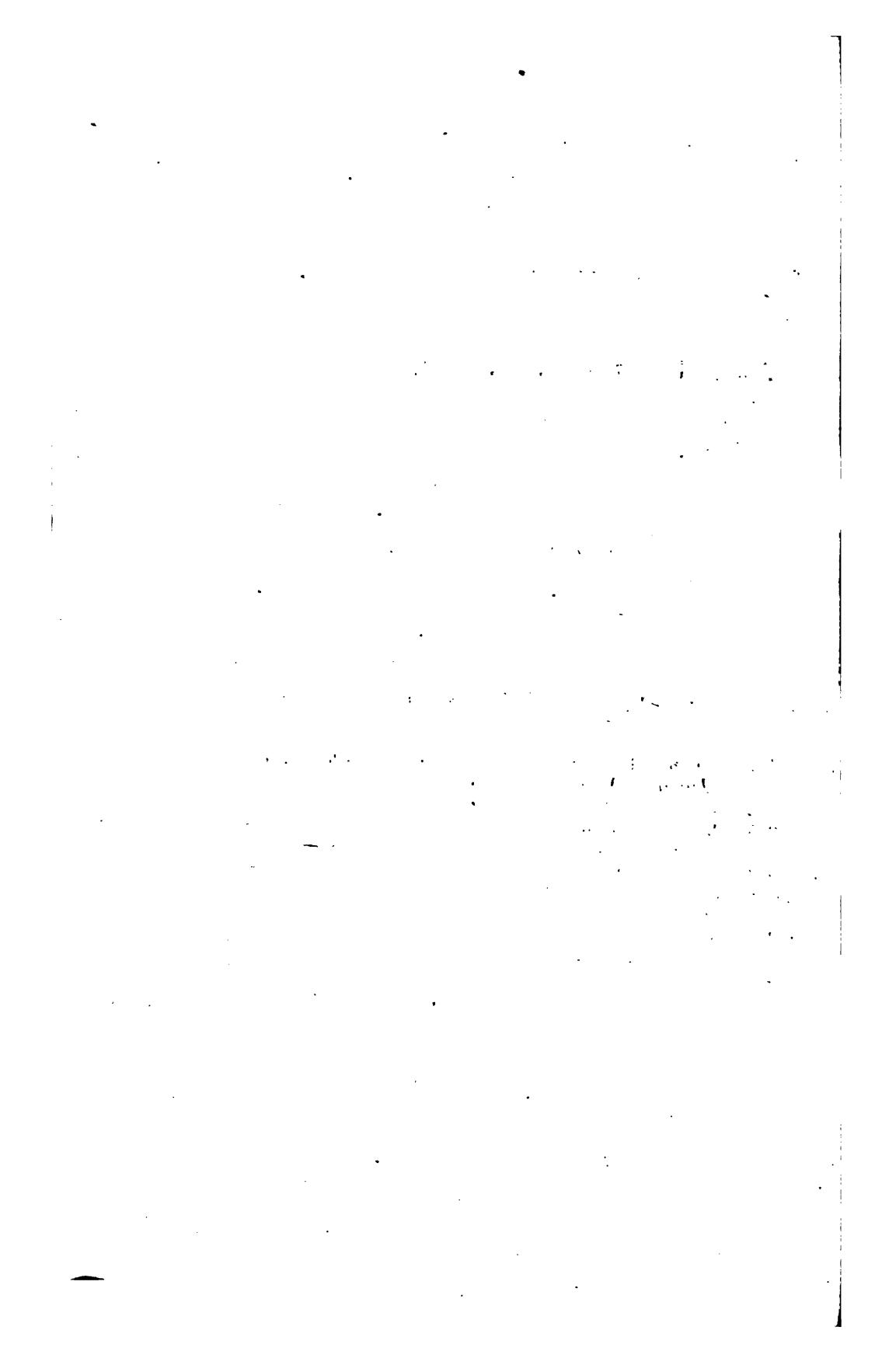
ROBERTSON
v.
Col. Ins. Co.

[*493]

The defendant's counsel cited *Goix v. Low*, (1 *Johns. Cas.* 341. 406,) *Suydam & Wyckoff v. Marine Ins. Co.* (1 *Johns. Rep.* 181. 190,) *Schmidt v. The United Ins. Co.* (1 *Johns. Rep.* 249. 262,) *Speyer v. The New-York Ins. Co.* (3 *Johns. Rep.* 88. 93, 94,) *Kane v. The Columbian Ins. Co.* (2 *Johns. Rep.* 264,) 11 *East's Rep.* 21.

Per Curiam. There was no necessity for going from *Teneriffe* to *Madeira*. It was sailing on a different voyage from the one insured. The master went there to sell his cargo; and for the same reason, he might have gone to *Lisbon*. It was a voluntary deviation from the voyage mentioned in the policy. Nothing but necessity, or an apprehension of danger, could excuse his departure from the usual and direct route to *Bonavista*; and as this part of the voyage was abandoned and never commenced, the plaintiff is entitled to a return of the one *per cent.* premium mentioned in the policy, and no more.

Judgment accordingly



C A S E S
ARGUED AND DETERMINED
IN THE
Court for the Trial of Impeachments
AND
THE CORRECTION OF ERRORS,
OF THE
STATE OF NEW-YORK,
IN FEBRUARY AND MARCH, 1811.

DANIEL FRIER and PETER COOPER, Plaintiff in error,
against

JAMES JACKSON, *ex dem.* JOHANNIS L. VAN ALLEN
and JOHN J. VAN ALLEN, Defendant in error.

THE defendant in error brought an action of ejectment, in the Supreme Court, on the demise of *Johannis L. Van Allen* and *John J. Van Allen*, to recover of the plaintiffs *in error, the possession of a grist mill, saw mill, and lands thereto adjoining, situate in the town of *Kinderhook*, in the county of *Columbia*.

A bill of exceptions does not draw the whole matter into examination, but only the points to which it is taken, and the party must lay his finger on the points which arise either in admitting or refusing evidence, or matter of law, arising from a fact not denied, in which he is overruled by the court. (b)

The construction of a grant is matter of law; but its legal effect, deducible from its terms or matter subsequent, which by showing the sense of the parties, may authorize a larger or narrower construction so as to include or exclude the premises in controversy, is a matter of fact for a jury only to decide.

The true construction of *De Bruyn's* patent is a line from *David's Hook* to the *Saw-kill*; drawn between those two points, along the east shore of the *Hudson's* river, to compose the *western* boundary; a line along the west bank of the *Fish-lake*, in its whole extent, the *eastern* boundary; and straight lines from the extremities of the *Fish-lake*, to the stations on the *Hudson* or *David's Hook* and the *Saw-kill*; the *northern* and *southern* boundaries. (c)

The patent to *Baker* and *Flodder*, in 1667, is not void, for uncertainty.

(a) *Acc. Austin v. Jackson*, 1 *Wendell*, 27. But a demise in a declaration in ejectment laid from a man who was dead at the commencement of the suit, may be objected to at the trial, and is ground of nonsuit. *Doe v. Butler*, 3 *Wendell*, 149, and the defendant may move to have the demise of a lessor, who died before the commencement of the action struck out of the declaration. *Jackson v. Bankcroft*, 3 *Johns. Rep.* 259.

(b) *Acc. Jackson v. Cudwell*, 1 *Coven.*, 623. *Whiteside v. Jackson*, 1 *Wendell*, 418.

(c) *Vide Jackson v. Ambler*, 14 *Johns. Rep.* 96.

IN ERROR.

ALBANY,
Feb. & March,
1811.

FRIER

v.

—.

The cause was tried at a circuit court held in and for the county of *Columbia*, in *July*, 1806, before his honor *Daniel D. Tompkins*, Esq. then one of the justices of the Supreme Court, when a verdict was found for the plaintiff below, in conformity to the opinion of the judge, as expressed in his charge to the jury. To this charge, the counsel for the defendants below took a bill of exceptions. Judgment having been rendered in the Supreme Court, on the verdict, the defendants below brought a writ of error returnable to this court.

The plaintiff below derived title to his lessors, in a tract of land, granted by letters patent, to *John Hendrix De Bruyn*, dated the day of *December*, 1686, in the second year of the reign of King *James II*. This patent, after reciting an *Indian* deed, dated in 1668, grants as follows:

"A certain piece or tract of land, lying on the east side of *Hudson's river*, or the river of *New Albany*, beginning from *Davidson's creek*, which creek lies against *Bear Island*, called in the *Indian* tongue, *Pahsapaenpenock*, and from said creek, stretching southerly, along the river to the *Saw-kill* of *Frans Peterse Claver*, the creek in the *Indian* tongue called *Petteenock*, stretching to the east, and in the woods, to the first two lakes or in-waters, which are called by the *Indian* *Hithook* and *Wawagewashook*."

The plaintiff gave in evidence, 1. A deed from *De Bruyn*, the patentee, to *Lawrence Van Allen*, dated twenty-third *September*, 1707, in fee, for the consideration of four hundred pounds.

2. The will of *Lawrence Van Allen*, dated fourth *March*, 1712-13, under the residuary clause of which, all his real estate (not before specially devised) was devised to his nine children, as tenants in common, in fee, viz. **Johannis*, *Evert*, *Peter*, *Stephanus*, *Enycas*, and *Jacobus Van Allen*; *Catharine*, the wife of *Malgert Malgertse Van Derpool*; *Janite*, the wife of *Lendert Philipsie Conine*; and *Christiana*, the wife of *Johannis Van Deusen*.

3. The will of *Evert Van Allen*, dated sixteenth *September*, 1719, devising all the right and title which he acquired under his father's will, to his brother *Lucas Van Allen*.

4. A deed, in consideration of natural love and affection, from *Johannis Van Deusen* and his wife to *Lucas Van Allen*, for the ninth part of the estate devised by their father.

5. The plaintiff next proved that *Lucas Van Allen*, the son of *Lawrance*, the elder, died prior to the revolutionary war, leaving two sons, *Lawrance* and *John*, and that *Lawrance*, the eldest, was now living.

6. A lease, bearing date the twenty-fourth of *March*, 1800, from *Lawrance* and others, to the lessors of the plaintiff, for twenty-one years, to enable them to bring suits at law to re-

cover the premises therein described, as follows: "A certain tract or tracts, piece or pieces of land, situate on both sides of the run of water, called *Vulletje's Kill*, together with the said run of water and lands thereby covered; and being parcel of a patent, commonly called *De Bruyn's* patent, situate," &c.

7. The will of *Jacobus Van Allen*, (the son of *Lawrance* the elder,) dated fourteenth of October, 1754, by which he devised all his real estate to his three sons, *Lawrance*, *Johannis*, and *Abraham*. *Abraham* died without issue; his eldest brother, *Lawrance*, was his heir at law. *Johannis* died, leaving *John J. Van Allen*, (one of the lessors of the plaintiffs,) his eldest son and heir, who, as heir of his father, claimed one third of one ninth. The said lessor died in 1805, leaving a brother and sister, his heirs at law. *Lawrance*, (the son of *Jacobus*, the son of *Lawrance Van Allen* the elder,) by his will, bearing date the nineteenth of June, 1790, devised all his real estate to his *widow, *Jane Van Allen*, who was a party to the lease, dated twenty-fourth of March, 1800.

The two shares of *Evert* and *Catharine*, the plaintiff contended, were united in *Lucas* their brother, with his ninth, and that these three ninths descended to *Lawrance*, his eldest son, who, in *March*, 1800, made the lease, for the purpose of bringing this suit. The lessors claimed these three ninths, together with one ninth, the original share of *Jacobus*, (the son of *Lawrance* the elder.) This last mentioned ninth, they claimed under the same lease, executed by *Jane Van Allen*, who derived her title (an estate during widowhood) under the will of her husband, dated in 1790.

Johannis L. Van Allen, the other lessor of the plaintiff, died in 1804.

8. A map of the patent, made by *John E. Van Allen*, was produced and proved, exhibiting the location thereof, according to the construction contended for by the plaintiff below, that is the river between *Davidson's* creek and the *Saw-kill*, is represented as the base, and upon that base, the body of land stretches east until its extent is terminated by the lakes. It was proved, that, upon this construction, the premises in question are included within the patent; and that if the northern boundary of the patent be run from the mouth of *Frans Peters's Saw-kill* to the southern extremity of the lakes, the premises would also be included. But if the said southern boundary be run from the mouth of the said kill to the nearest point of the lakes, the premises in question are excluded; and that lines run from the two stations upon the river east, until a north and south line would strike the west side of the lake or lakes, would also exclude the premises.

As early as the year 1720, a survey and map was made of

IN ERROR

ALBANY,
Feb. & March
1811.

FRIER
v.
JACKSON.

[* 498

IN ERROR.

ALBANY,
Feb. & March,
1811.

FRIER
v.
JACKSON.

the patent to *De Bruyn*, by *Philip Ver Planck*, a surveyor of eminence at that day, in conformity to the construction adopted by the plaintiff below; the *north and south boundary lines running east, and the lakes being the eastern extent of the patent. At the same time, a partial division was made by the said *Philip Ver Planck*, of lands on the eastern extent of the patents; and the proprietors being then nine in number, one lot was assigned to each, and conveyed by them to each other, in severalty, and so held ever since.

In the year 1751, the patent was surveyed by *I. R. Bleecker*, and a division was made of another portion of the said patent by him; and, as it was contended by the plaintiff upon the same principle of construction with *Ver Planck*'s survey; and on that division several lots, to wit, No. 8. 17. 30, and 31, lying in the disputed lines, were laid out adjoining to the south boundary line of the patent. This last mentioned division was confirmed by an act of the legislature of this state, passed the fourth day of *February*, 1793, which contained a proviso that nothing therein should affect the rights of any person or persons, except those claiming under *Lawrance Van Allen*.

It was also proved, on the trial, that the boundaries of the patent to *De Bruyn* had been known, and actual possessions and improvements made under it, throughout every part of the same, and particularly along almost the whole extent, of the north and south boundary lines, as far back as the memory of man reached; and that such possessions and improvements have been uninterruptedly held and enjoyed accordingly, to the time of trial.

In further confirmation of the principle of location contend-ed for by the plaintiff below, he produced letters patent to *Burger Huyck* and others, dated the sixth day of *October*, 1731, the boundaries whereof are described as follows:

"A certain tract of land situate, lying and being in the county of *Albany*, on both sides of the *Kinderhook* creek or river, beginning at a small black oak tree, *marked with three notches, and standing on the brow of the falling off hills, near the south end of the land granted to *Dirck Wessels* and *Garret Teunisse*, and on the west side of the *Kinderhook* creek or river, and on the south side of a small run of water, running down the said hills, which tract runs from the said black oak tree, north sixty degrees west ninety-five chains, then north five degrees east forty chains, to the easterly bounds of a tract of land granted to *Jan Hendrix De Bruyn*; then along his bounds north twenty-seven degrees east ninety-three chains, to a large fish pond; then south-easterly; and northerly along the south and east sides of the said pond to," &c.

By the testimony of *John E. Van Allen* it was proved, that

he had never surveyed the latter patent, with any reference to the former, but that he run the east line of *De Bruyn's* patent, as claimed by them in 1793. Its course was then north 9 degrees 15 minutes east. The description of the east line of *Huyck's* patent was north, 27 degrees east, and if the allowance of the variation of the compass were made, it would cause those lines to diverge still more. The distance from the south-east corner of *De Bruyn's* patent, as shown, to the lake, was one hundred chains, fifty-eight links, and that from the south-west corner of *Huyck's* patent to the lake, was ninety-three chains. The witness did not know that he had ever run the south line of *Huyck's* patent, nor could he speak with any certainty as to the effect of the lines of *Huyck's* patent upon *De Bruyn's*; but from his general knowledge of the country, he believed the southern line of *Huyck's* patent would strike near the south-east corner of *De Bruyn's* patent; but of this he had no knowledge by actual survey.

The plaintiff also produced letters patent to the freeholders and inhabitants of *Kinderhook*, bearing date the fourteenth day of *March*, 1686, in the third year of King *James* the second, for a tract of land, thus described: "All that tract or parcel of land that lieth on the east *side of *Hudson's* river, beginning at a place called *Swarte Hook*, and runs north upon said river four *English* miles to a certain place called *David's Hook*; and then runs east into the woods, keeping the same breadth to the land of *Dirck Wessels* and *Garret Teunisse* and the high hills, eight *English* miles; and then south to the fall of Major *Abraham's*." This patent distinguishes between such "parcels as had been in anywise taken up, divided, allotted, settled and appropriated," and the remainder not yet "taken up or appropriated." The parcels of the former description are granted to twenty-eight of the proprietors, by name, (*De Bruyn*, being one of them,) "and to their several and respective heirs and assigns." The remainder is granted to thirty-one persons, including the twenty-eight before mentioned, and to their heirs, successors and assigns, to be divided according to the acts, concessions and agreements of the inhabitants, at their town-meetings.

A survey and map of partition of the last mentioned patent was made, in the year 1762, by *Hermanus Wendell*, *Garrit Van Den Bergh* and *Isaac Vrooman*, commissioners, appointed in pursuance of the acts in that case made and provided, which map was filed in the clerk's office of the city and county of *Albany*; on which partition, the whole of said patent to the freeholders and inhabitants of *Kinderhook*, which had not been theretofore appropriated, was laid out in lots; and the patent to *Jan Hendrixe De Bruyn* is on the said map of division, which the counsel for the plaintiff con-

IN ERROR.

ALBANY,
Feb. & March,
1811.

FRIER
v.
JACKSON

[* 501]

IN ERROR.
ALBANY,
Feb. & March,
1811.

FRIER
V.
JACKSON.

[*502]

tended is recognised within the same boundaries, and on the same principle of location as always claimed by the proprietors thereof.

Witnesses were also sworn, to show, that the boundary line between *De Bruyn's* patent and the patent to *Kinderhook*, being the south boundary line of *De Bruyn's* patent, has always, since the said partition, *in 1762, been held and possessed in conformity to the recognition thereof, in the said partition.

It was admitted that the lessors of the plaintiff were both dead: one of them died about two years, and the other about one year, before the time of the trial; but their lease to the plaintiff was yet unexpired.

The defendants below contended, that the premises in question were included within the bounds of an older patent, granted to Captain *John Baker* and *Jacob Janse Flodder*, in 1667, the boundaries of which were as follows: "A certain parcel of bush land near *Fort Albany*, together with the creek or kill, with the fall of waters, running north and south, lying and being upon the north side of the *Emiques'* land, at *Kinderhook*, and on the west side of the great kill, containing by estimation — acres of land. The deed of purchase from the said *Indians*, bearing date, at *Fort Albany*, March 18, 1666." By the *Indian* deed to the above named patentees, the *Indians*, in consideration of one blanket, one axe, three hoes, two bars of lead, three handfuls of powder, one knife, and one kettle, conveyed "all that bush land and kill and fall, running north and south, lying and being upon the north side of the *Emiques'* land, at *Kinderhook*, and on the north side of the great kill." This deed was filed in the secretary's office, in February, 1667.

The defendants proved the death of *Flodder*, the patentee, leaving *John Jacobse Gardinier*, his eldest son, and heir at law, who died, leaving *Jacob Gardinier*, his eldest son and heir at law. They also produced a deed from *Jacob Gardinier* to *Edward Wheeler*, dated June 1, 1710; in which the premises conveyed are thus described: "A certain creek called *Vallatje's Kill*, with a saw-mill and a grist-mill standing thereon, in the county aforesaid, behind *Kinderhook*, with all the land and wood belonging thereto, so as the same is now possessed by the said *Edward Wheeler*, according to a *patent granted by Governor *Richard Nichols*, in the year 1667, on the thirteenth *April*; and also according to a deed of the eighteenth *March*, 1666, and referred to in the aforesaid patent to *John Baker* and *Jacob Janse Flodder*."

They next produced a deed from *Edward Wheeler* to *Evert Wheeler*, dated fifth *January*, 1739, for the north part of the tract granted to *Flodder* and *Baker*, and described as

[*503]

ying upon the *Vallatje's Kill*, beginning where the *Bollegrat sprout* or *branch* empties into said kill, thence going up said creek, and taking in all the lands and woodlands, east and west, as far as the said *Edward Wheeler's* right extended, to the uppermost part of the pine plains; also, a deed for the same part, from *Evert Wheeler* to *Peter Deyo*, dated twenty-seventh *October*, 1766, for the consideration of forty pounds. They then proved the death of *Edward Wheeler*, leaving *Robert*, his eldest son and heir; and produced a deed from *William Wheeler* to *Peter Deyo*, dated seventh *May*, 1766, for the residue of the patent to *Flodder* and *Baker*, for the consideration of ten pounds. These deeds to *Deyo* contained full covenants of seisin and warranty. The defendant also produced a deed from *Peter Deyo* to *Daniel Frier*, one of the defendants in the court below, for a lot of four hundred acres, including the premises in question, for the consideration of four hundred pounds.

The counsel for the defendants then attempted to show, by the testimony of witnesses, many of whom were very aged, the ancient possessions and reputed boundaries of *Flodder* and *Baker's* patent; the whole of which evidence was detailed in the bill of exceptions, but which it is unnecessary to state here.

The counsel for the defendants insisted, at the trial, that upon this evidence, the plaintiff was not entitled to recover,

1. Because, both of the lessors of the plaintiff were dead, and the title was, at the time of the trial, in their heirs at law, and, consequently, could not entitle the plaintiff to recover seisin and possession of the premises in dispute.

2. Because, upon a just construction and location of the patent to *Jan Hendrixe De Bruyn*, under which the plaintiff claimed, the premises in question could not be included.

3. Because, by a correct construction and location of the patent to *John Baker* and *Jacob Janse Flodder*, the premises in question would be covered by that grant, which being older than the one under which the plaintiff claimed, must first be satisfied.

4. Because, the possession of the defendants, and those under whom they claim, have been exercised for such a period, as to toll the right of entry of the lessors of the plaintiff, if any such right in them had ever existed.

But the counsel for the plaintiff insisted, that upon the evidence offered, the plaintiff was entitled to recover,

1. Because *James Jackson* was the plaintiff in this action, and the death of his lessors could not prevent his recovery.

That the patent of *John Baker* and *Jacob Janse Flodder* did not cover the premises.

IN ERROR.

ALBANY,
Feb. & March,
1811.

FRIER
v.
JACKSON.

[* 504]

IN ERROR.

ALBANY,
Feb. & March,
1841.

FRIER
v.

3. That it was not capable of any location whatever.
4. If, at the date of it, any actual possession was acquired under it, although it might protect any such contemporaneous possession, it could not, at this late date, be so located, as to embrace any thing more.
5. The patent to *John Hendrix De Bruyn*, under which the plaintiff claims, upon a just construction and location, included the premises in question; and,
6. No adverse possession is proved sufficient to toll the right of entry of the lessors of the plaintiff.

The judge delivered his opinion to the jury, as follows:

[505]

“The motion for a *non-suit*, for the death of the lessors * of the plaintiff, is overruled. Such death cannot affect the plaintiff’s right of recovery; at least, it cannot be taken advantage of at *nisi prius*. The first question rises upon the location of the patent to *De Bruyn*. That is a question of law, unless the patent is ambiguous. In my opinion, it is not ambiguous, and the construction contended for by the plaintiff is correct. The term *stretching* is to apply to the whole tract of land, and not to the lines, or any of them. The whole tract is to stretch east, in the manner laid down upon the plaintiff’s maps.

“The construction of this grant being matter of law, is disposed of by the court; and I shall only leave it to the jury to determine, whether any acts of the parties, or acts of the government, have varied from the construction; for if they have not, the plaintiff is entitled to the verdict.

“The defence set up is double. First, under the patent to *Baker and Flodder*. This patent, supported only by the evidence now offered, is void, and incapable of location. It has no bounds to the east, west, or north, nor does its south boundary necessarily extend from east to west, the whole extent of the *Emiques*’ land, and nothing more can be protected by it, than what has been so long held under it, that no other patent covering it can take it away.

“If my construction is correct, and the premises are in *De Bruyn*’s patent, the question is narrowed down to the mere adverse possession of the premises in question. The question as to the extent of possession, and connection between the several possessors of the premises in question, is left to the jury. If they find an adverse possession of the premises in question, held by the defendants and those under whom they claim, in regular connection, continued for twenty-seven years and five months, prior to the commencement of this suit, then they must find a verdict for the defendants; otherwise for the plaintiff. An adverse *possession from the year 1774 to the present time, will not protect the defendants.

"The possessions of *Robert Wheeler* are not to be regarded as permanent adverse possessions ; they were probably intended as temporary, for the purposes of hunting, fishing, or cutting timber, without any design to claim the land.

"The deduction of title, made by the defendant, will not support the idea of adverse possession."

With these observations, the judge left the cause to the jury, who found a verdict for the plaintiff.

IN ERROR.

ALBANY,
Feb. & March,
1811.

FRIER
v.
JACKSON

The cause was argued by *Sudam* and *E. Williams*, for the plaintiffs in error, and by *Van Buren* and *Van Vechten*, for the defendant in error ; but the argument is omitted, as it would not be well understood, without a reference to the maps and diagrams which were produced.

THE CHANCELLOR. The bill of exceptions was taken to the opinion of the judge on four points.

1. Because both the lessors of the plaintiff are dead ; and on this the defendants grounded their motion for a nonsuit, which the judge overruled.

2. Because, upon a just construction and location of the patent to *Jan Hendrix De Bruyn*, the premises in question could not be included ; but the judge determined that the premises in question were covered by it.

3. Because, by a correct construction and location of the patent to *John Baker* and *Jacob Janse Flodder*, the premises in question were covered by that grant, which, being older than the one under which the plaintiff claimed, must be first satisfied. But the judge determined that the patent of *Baker* and *Flodder*, *supported only by the evidence offered*, was void, and incapable of location.

*4. Because the possessions of the defendants, and those under whom they claim, have existed for such a period, as to toll the right of entry of the lessors of the plaintiff, if any such right in the land ever existed. But the judge charged the jury, that if they found an adverse possession of the premises in question held by the defendants, and those under whom they claim in regular connection, continued for twenty-seven years and five months prior to the commencement of the suit, that then they should find for the defendants ; otherwise, for the plaintiff.

These points have been precisely stated in the court below, by the defendants in that court and the plaintiffs here, as reasons against maintaining the action ; and on those points, *in exclusion of all others*, the opinion of this court is required.

1. As to the first point. That the death of a lessor does not abate a suit in ejectment, has long been the settled doctrine. The action is considered as a legal fiction, devised to

[*507.]

IN ERROR.
ALBANY,
Feb. & March,
1811.

FRIER
v.
JACKSON

subserve the purposes of justice, and to be modelled, as those purposes require; and so far has this doctrine been carried, in advancement of justice, that even where the lessor was a tenant for life, his death was not permitted to abate the suit, which, it was held, might still be prosecuted, for the damages and costs. (2 *Str.* 1056. *Jenk.* 293. pl. 38. 1 *Bac. Abr.* 13. *Vin. Eject.* (T.) pl. 4.)

2. As to the second point. In the case of *Van Gorden v. Jackson*, (5 *Johns. Rep.* 467.) I said, that a bill of exceptions was given by statute, not to draw the whole matter into examination, but only on the points to which it was taken; and that the party excepting, must lay his finger on those points, which might arise either in admitting or denying evidence or matter of law, arising from a fact not denied, in which either party was overruled by the court. (2 *Bac. Abr.* 529. *Bill of Exceptions*, and the cases there cited, 2 *Caines*, 169.)

[* 508]

*The case on which this court is now required to decide affords a striking illustration of the utility of this doctrine; for if the court is to pursue the counsel, in the line of their discussion, they must, after deciding on the law, examine the evidence, weigh the relative credibility of the witnesses, and determine on the existence of facts, to the total subversion of one of the most salutary maxims of our law, that to questions of fact the jury are to respond; to questions of law the judges.

The second point relates to the construction of the patent to *Jan Hendrix De Bruyn*. The construction of a grant is matter of law. Its legal effect is only deducible from its terms, according to the intent at the time of making it; (3 *Bac. Abr.* 393;) and matter subsequent, which, by showing the sense of parties, may authorize a jury to give a more liberal or restricted construction to it, as deduced from such matter, is exclusively in the province of the jury. It applies with equal force, whether the terms in which the grant is conceived are certain or ambiguous; for both require extrinsic aid to give them effect, which aid it is not in the power of the court to afford. Thus, if the place from which the description commences, is a *lake*, and the place to which it is to proceed, a *brook*, the court would restrain the parties from taking a rock for the one, or a mountain for the other; but which was the particular lake or brook intended, must necessarily be left to the jury.

The patent to *De Bruyn*, dated in *December*, 1686, requires it to stretch from *David's Hook*, southerly, along the river to the *Saw-kill* of *Frans Peterse Claver*, stretching to the east, and into the woods to the two first lakes.

Respecting the two stations on *Hudson's river*, *David's Hook*, and the *Saw-kill*, there is no contention; and no construction has been suggested, as a substitute, for carrying the

eastern extent of *De Bruyn's* patent to the *Fish Lake*. The first reach, or stretch from one station *to the other, on the *Hudson*, has no latitude, and no direction, but along the river. This, therefore, could only have been a line along its shore, bending with, and corresponding to its inflections, from one point to the other.

The next stretch is to the east, and a single line in that direction covers no land; it could not possibly touch the two lakes, as they are described in the patent, or the two expansions of the *Fish Lake*; and it gives no closing lines; for if a single line is to be run east, it is absolutely necessary to supply others, if the lake is not coextensive with the distance between the two stations on the *Hudson*, from the termination of the east line to and along the lake, and from thence a closing line to *David's Hook*. There are no terms in the grant which can possibly supply these lines, if lines only are assumed, as the means of description; and I know of no legal principle, which will afford a ground for so subtending those lines.

In giving my opinion, in the case of *Van Gorden v. Jackson*, (5 *Johns. Rep.* 462,) I said, that the word *stretching*, in its common use in grants, during the early periods of the *English* colonial government here, was applied either to the extent of a single line, or to a rolling location, in which the breadth being described by lines or surfaces, was carried, with such breadth, to the object described at its *terminus*. This I still think correct, when applied either to a line, or to a rolling patent, not limited in its lateral extension, after departing from its base.

The patent of *De Bruyn* has no extent eastward from the river, unless the rolling construction is applied. It is to stretch east, and into the woods, to the first two lakes. No other lakes having been shown, to which the description can apply, the *Fish Lake*, which, from its conformation, was probably considered as composing two distinct lakes, and respecting which there has not been *much contention, must be taken to be the lakes intended in the patent. The space between the two points on the river, are admitted to be at a greater distance from each other than the northern and southern extremities of the lake.

It does not require a square or a parallelogram to satisfy the terms of this patent. If, as far as respected its lateral extent, it was to have been located in unlimited space, and the lake had been of as great or greater extent than that between the two points on the *Hudson*, its breadth, to satisfy the terms of the patent, ought to be carried without variation throughout; but its lateral eastern extension must unavoidably be contracted by circumstances. Thus, if the terms had been, stretching

IN ERROR.

ALBANY,
Feb. & March
1811.

~~~~~  
FRIER  
v.  
JACKSON

\* 510 \*

IN ERROR.ALBANY,  
Feb. & March,  
1811.FRIER  
v.  
LAWSON.

to the east, to a tree accurately described, so as not to admit a doubt of the tree intended standing on the west bank of the *Fish Lake*; these terms, construed according to the settled law, uniformly applied to all the grants of the crown, that they shall receive a construction most beneficial to its interests, would have imposed a construction, that two lines, drawn from the given stations on the *Hudson* to such tree, so as to make it the vertex of the triangle, included the land intended to be granted; and if, instead of a *tree*, a *lake* (as in this case) was given, as a boundary, of less extent than the space between the two stations on the *Hudson*, the construction on the same principle, must be, that all the land lying between the *Hudson*, and the lake, and straight lines drawn from the extremities of the latter to the stations on the *Hudson*, was included by that description. If this rule was not to be applied, the extension of the whole breadth to the point, at which it first touched the lake, would equally satisfy the terms of the patent, with the construction which I deem the correct one.

[\*511] My construction of the patent, deduced from these considerations, is, that the line from *David's Hook* to \*the *Saw-kill*, is to be drawn between those points, along the east shore of the *Hudson*, and composes the western boundary; a line along the west shore of the *Fish Lake*, in its whole extent, the eastern boundary; and straight lines from the extremities of the lake, to the stations on the *Hudson*, *David's Hook*, and the *Saw-kill*, the northern and southern boundaries. This construction satisfies all the terms of the patent.

The direction of the extent from the river is positively east. As applied to the space on the *Hudson* and on the lakes, the diagrams of the parties united in showing that the direction was accurately described. The outlines, however, on the given construction, do not comport with an east course. If the description had applied to lines only, the well settled rule of construction, that where a course and natural boundary are given, and they do not correspond, the course must yield to the boundary, as more certain, would reconcile them; but if it is only applied to a line run to the *lakes*, it being required to be run east to the *lakes*, though it might be a question at what particular part of the *Fish Lake* the east line was to terminate, no liberality of construction could substitute a line, widely departing from it, and which would require almost a right-angled line to close on it, when a direct line, in that sense, was described, commencing at the *Hudson*, and terminating at the lake.

Whether the location I have described will exclude the premises in question, is not a subject for the determination of this court; for here, as in the court below, after the law has

been pronounced, the jury *only* can apply it to the facts, which are to be collected by them from the evidence adduced ; and they only can decide whether the premises in question are within or without it. In this case, if the judge has not given the true construction, he has mistaken the law on the subject, and if, instead of leaving it to the jury to decide whether *De Bruyn's* patent included the premises, he has decided, *as matter of law*, that the premises were covered by it, he assumed a right of determining on both law and fact ; and in that he has erred. If, indeed, the judge, in giving his opinion on the result of the evidence, had so charged the jury, the better resort would have been to the Supreme Court, for a new trial, on the ground of misdirection ; but as it comes up, as a matter of law, arising from a fact not denied, *the existence of the patent*, I hold it, if it is well taken, a valid reason to be assigned in error.

3. The next point in the bill of exceptions, is, that the judge determined that the patent of *Baker* and *Flodder*, supported only by the evidence offered, was void, and incapable of location.

In the exposition of ancient grants, our courts have uniformly been liberal, to give effect to them, according to their intent. The patent to *Baker* and *Flodder* is an ancient grant. It is dated in 1677, only three years after the surrender of the colony to the *English*, and intermediate that event, and its final cession, in 1674, a period claiming peculiar indulgence as to the construction of the grants then issued ; the descriptions of that day being more inaccurate, from the circumstance of the conquering and conquered people speaking different languages ; from the imperfect knowledge of the interior of the country, beyond the shores of the navigable waters ; and from the grants not being preceded by actual surveys. All these considerations are connected with the general history of the country, and some of them are deducible from the grants now under examination, and, of course, proper to be mingled, in giving it a construction, if it should be requisite to resort to those aids ; for whatever may be the circumstances under which it was made, it must receive its construction from its terms, and according to its intent at the time it was issued ; but to test the opinion in review, it is only necessary to determine whether *this is a void grant*.

From the terms of *Baker* and *Flodder's* patent, it is to *\*be collected*, as a legal construction, that a certain parcel of bush or wood land, together with a creek or kill, with the fall of water, running north and south, lying and being on the north side of the *Emiques'* land, and on the west side of the great kill, was granted.

*Bush or wood land, a creek and a fall*, are descriptions of  
VOL. VIII. 50

IN ERROR.

ALBANY,  
Feb. & March  
1811.

FRIER  
v.  
JACKSON.

[\*512]

[\*513]

IN ERROR.   
ALBANY,  
Feb. & March,  
1811.

FRIER  
v.  
JACKSON.

subjects susceptible of grant; and the further description, lying on the north side of the *Emiques*' land, and the west side of the great kill, without evidence extrinsic the patent, might, by possibility, be as perfect as the ingenuity of man could have devised, for aught that appears from the patent; for the great creek and the *Emiques*' land might form a square, a circle, or a polygon, completely enclosed, and defined by those objects.

In every general description of this kind, its application is to be determined from the situation, form and extent of the objects to which it relates; and both the *Emiques*' land and the creek, though the general bearing of the whole extent might satisfy the terms of description, as lying on the north side of the one, or west side of the other, might be of a shape to enclose the land granted, so as to leave no doubt as to the object of the grant.

Uncertainty as to the application, abstracted from the question of law, must unavoidably exist, as to all grants; for it will be readily comprehended, that it is not possible to make a grant of any parcel of land, by metes and bounds, defined with perfect accuracy, which a stranger, totally unacquainted with the objects of the grant, but from its import, and unacquainted with the country contiguous to it, can locate, without acquiring a certain portion of knowledge for that purpose, extrinsic the grant. He must ascertain the distance and names of the lakes, rivers, or creeks, if either compose part of the description; and in locating the simplest figures, a square or a circle, the place of beginning of the one and the centre of the other, must be necessarily discovered by inquiry, or knowledge acquired extrinsic the grant; and a \*person perfectly acquainted with every circumstance essential to a correct location, could not possess that knowledge intuitively; but would insensibly avail himself of it, as if it had been expressed in the grant.

[\* 514]

The judge, in this case, did not find his opinion on the patent only, but also on the evidence offered in connection with it; the qualification he made, that nothing more could be protected by the patent than what had been so long held under it, that no other patent covering it could take it away, he obviously grounded on the right of possession only, for it could have no effect on the possessory right, but as evidence that the person possessing claimed the land as his own. From a void patent, no right could possibly be deduced.

This could not be a void grant, on another ground; for some of the subjects of grant were obviously described with sufficient certainty. A *creek* is a word as certain as a *house*: a *fall*, if a distinct object of grant, is equally so. That a fall is mentioned, when, in fact, there were several falls on the creek granted, which has been urged, though it does not appear, would not detract from its certainty, if the creek passed

for a grant of a tract of land, comprised in certain and indubitable boundaries, together with a *house*, would pass all the other houses erected on it.

The only authority which has been cited, as applicable to this subject, is one in which a tract of land was granted, as lying in one county, when, in fact, it extended into another. It was held, that it could not operate to pass the land beyond the bounds of the county to which it was limited; and this cannot, on any construction, be considered as uncertain, for it was *certainly* beyond the limits of the grant. (*Moore*, 176. 3 *Bac. Abr.* 389.)

In this case, the charge was general, that the grant was void. If it is void, this court, by concurring in that opinion, will decide the only question presented on this \*point; for it cannot be necessary to examine the construction of a totally inoperative grant. If it is not void, the application of the construction cannot be got at here; for by pronouncing the opinion of the court below erroneous, all decision, beyond that point, must be extrajudicial.

The court below was not correct in deciding beyond the mere question of law; for, as to the facts, the jury were to decide exclusively; and this rule is so rigid, that in an action of *trover*, though a demand and refusal is so far conclusive evidence of conversion, that the court will set aside a verdict finding contrary to it, yet if upon a special verdict, both demand and refusal are found, it has been held, that the court cannot infer a conversion from those circumstances.

I am, therefore, satisfied that the opinion expressed on this point, was not correct; and that in this there is also error.

4. The fourth point did not arise in admitting or denying evidence or matter of law, arising from a fact not denied. It was a proper subject to ground an application for a new trial. It is not, therefore, a point on which the opinion of this court, on a bill of exceptions, can be required.

I have before intimated, that the mode of proceeding, by bill of exceptions, is derived from a statute provision, that it was the intent of the statute to enable a party to avail himself of error not apparent from the record; that the review is rigidly confined to the precise exceptions in the bill, and to no other; that it never can be a ground for a general examination of the record, much less of the evidence offered in a cause, which is only introduced explanatory of the bearings of the exceptions; that the statute did not intend to withdraw from the jury their incontrovertible right of determining upon facts. Hence all the points which have been discussed, not appearing from the bill, were not well addressed \*to this court; and must be considered as out of the case; and whether the patent of *Baker and Flodder* is to receive the one construction contended for,

*IN ERROR.*

ALBANY,  
Feb. & March,  
1811.

~~~~~  
FRIER
v.
JACKSON

* [515]

[* 516]

IN ERROR.

ALBANY,
Feb. & March,
1811.

FRIER
v.
TICKSON.

or the other, cannot, on this bill, be a subject of decision. If its correct legal effect had been communicated to the jury, it would have become their duty to have considered the evidence; to contrast, to weigh it, to decide on the relative credibility of the evidence offered, and from the whole, to locate the patent. That they were not permitted to do so, appears to me to be manifest error; and for the reasons I have assigned, I am for reversing the judgment, on the second and third exceptions taken in the bill.

Lewis, senator, declared himself of the same opinion.

Platt, senator, also concurred.

H. YATES, jun. senator. The points in this cause, as stated in the bill of exceptions, taken to the opinion of the judge at *nisi prius*, are four. (Here he stated them.)

The rule of practice, as to the first point, has long been settled, the action of ejectment being a mere fiction to try the title. Where the estate does not cease to exist in the heirs, by the death of the lessor of the plaintiff, the suit does not abate.

The second point involves the construction of the patent to *Jane Hendrixe de Bruyn*, granted in December, 1686, under which the plaintiff claims.

The description of this patent is as follows: "That certain piece or tract of land lying on the east side of *Hudson's* river beginning from *Davidson's* creek, and from said creek stretching southerly along the river to the *Saw-kill* of *Frans Peter Claver*, and stretching to the *east, and in the woods to the first two lakes, or in-waters."

[* 517]

Was the question now to be decided on the testimony, as presented in the bill of exceptions, the original location, the survey by *Ver Planck* in 1720, the regulations of government in 1731, the division made by *Bleecker* in 1751, and the admissions, as far as the acts of the patentees of *Kinderhook* could be called so, in the subdivision of their patent, would be strong reasons for not disturbing lines which had been acquiesced in for so long a period of time; but we are confined within narrower limits. The question before the court now to be decided is, whether the judge was or was not right in his decision and charge to the jury, and which, on this point, was a mere legal construction founded on the patent itself. A construction must, therefore, be given by us to this patent, without that testimony. The line from *Davidson's* creek to the *Saw-kill* of *Frans Peter Claver*, is along the river; it is admitted that the *Fish Lakes* is one of the lakes intended in the grant, and from the facts, as they appear before us, we

have reason to believe that the *Fish Lake*, from its form, is the same with the two lakes mentioned in the said grant. Those facts being settled, and in some measure admitted by both parties, it follows, of course, that the river is the western, and the lake the eastern boundary. The only question then to be determined, on this second point, is, what construction must be given to the word *stretching*, as used in the patent; whether it applies to the lines, to the land, or to both; and if applied to either, or both, whether it necessarily follows, that the northern and southern boundary lines of the patent should be parallel to each other, and should be extended from the river, as its base, a due east course, until it intersected a line north and south through the lake. If a correct construction will not warrant the running of the southern line, parallel to the northern, or a due east course, whether *that line ought to incline to the north, so as to touch the most southern extremity of the lake, or should incline still more to the north, so as to touch that part which is nearest the river, being the westernmost extremity of the lake. *Stretching*, as used in the patent, is, in my opinion, applicable to the lines as well as the land; that it does apply to the lines, is evident from the manner in which the same word is before used in the description of this patent: "From said creek *stretching* southerly along the river, to the *Saw-kill* of *Frans Peter Claver*," clearly intending that the line along the river should *stretch southerly*: the *Saw-kill* of *Frans Peter Claver* not extending along the southern bounds of the whole tract: and that the lines, as well as the land, are intended by the word *stretching*, as used the second time, appears evident to me, from the consideration that the place of beginning, at the north-western corner of the tract, had been designated, and the line along the *Hudson*, and the south-western corner mentioned. The general words, therefore, "*stretching to the east*," are applicable to the land, as lying along the described base, and more particularly to the lines as *stretching* from the northern and southern extremity of the base "to the east," or a due east course, as nearly as possible, so as to cause both lines to touch the lake or lakes. If, therefore, a due east course of the south line will touch the lake at all, to this course they ought then strictly to adhere, in ascertaining the true bounds of the patent; but if it will not touch the lake, a straight line, for the southern bounds of the patent, ought to be drawn from the south-western extremity of the base to the lake, deviating from a due east course as little as possible. It would be improper to draw the line from the *Saw-kill* to the nearest part of the lake, unless that part extended further south than any other part of it, but the line must be so drawn as to touch the most southern extremity or projection of the lake. It is immaterial,

IN ERROR.
ALBANY,
Feb. & March,
1811.
FAYER
v.
JACKSON

[* 518]

IN ERROR.
ALBANY,
Feb. & March,
1811.

FRIER
v.
JACKSON.

in my view, whether this line *is the shortest or longest. When a natural boundary and course cannot both be reconciled or satisfied, the course ought to be abandoned no farther than is absolutely necessary to correspond with the natural boundary. If this line be adopted as the southern boundary, it is admitted that it includes the premises.

The judge, therefore, was correct, as far as it affects the present cause, in giving the construction to this grant, that the premises were included in it; but I do not agree with him in the opinion that "the whole tract of land, between the two river stations, must stretch east, in the manner laid down in the plaintiff's map."

The third point involves the construction of a patent granted to *John Baker* and *Jacob Janse Flodder*, described as follows:

"A certain parcel of bush land, near *Fort Albany*, together with a creek or kill, with the fall of water, running north and south, lying and being upon the north side of the *Emiques*' land, at *Kinderhook*, and on the west side of the great kill, containing, by estimation, —— acres of land."

This patent of *Flodder* and *Baker* will not admit of any possible construction, so as to include the premises. I am fully persuaded, from the words of the grant, that it is impossible at this time, to give any just construction to it, or to discover what was intended by government, except the creek at the fall, and the fall; but what, or how much land, is uncertain. We can only judge from the location of it by the patentee, which was the creek at the fall, and the land immediately adjoining. If any other possessions or locations did exist, the jury must have taken them into consideration, under the charge given by the judge; which charge, in relation to this patent, was, in my opinion, correct.

The fourth point, in relation to adverse possession, was properly submitted by the judge to the jury; and I see no cause of exception to the manner in which this *was submitted by him. The testimony was not such as to make out an adverse possession. I am, therefore, of opinion that the judgment of the Supreme Court ought to be affirmed.

But the majority of the court (for affirming, 6; for reversing, 14) being of opinion that the judgment of the Supreme Court ought to be reversed, it was thereupon ordered, adjudged and decreed, that the judgment rendered by the Supreme Court be reversed, that the record be remitted, and a *venire facias de novo* be awarded by the said court.

IN ERROR.

ALBANY,
Feb. & March,
1811.

CATLIN
v.
JACKSON.

SIMEON CATLIN, Plaintiff in error,
against
JAMES JACKSON, *ex dem.* GRATZ and others, Defendant
in error.

THIS was an action of ejectment, and was tried at the *Otsego* circuit, in *June*, 1806, when a verdict was taken, subject to the opinion of the Supreme Court, on a case, stating the evidence produced at the trial, with liberty to either party to turn the same into a special verdict. In *May* term, 1807, the Supreme Court, after hearing the case argued, gave judgment for the plaintiff below; and the defendant, the present plaintiff in error, having put the case into form of a *special verdict*, brought a writ of error to this court, in order to reverse the judgment of the Supreme Court. (See 2 *Johns. Rep.* 248.)

The material facts, stated in the special verdict, were as follows: *William Peters* recovered judgment in the Supreme Court of the province of *New-York*, in *January* term, 1770, against *George Croghan*, for £5,739 12s. 2d. 1-2 of debt, and £9 1s. damages and costs, which was duly docketed in the clerk's office, the tenth *February*, 1770. The judgment was, afterwards, in *October*, 1773, duly revived; and in *January*, 1774, *Peters* issued a *testatum fieri facias* on the judgment, directed to the sheriff of *Tryon* county, and returnable to the said court, on the third *Tuesday of April* then next. By virtue of this execution, the sheriff levied on a tract of land of which *Croghan* was seized, under a patent granted to him the sixteenth *January*, containing 40,000 acres. The execution was returned in *April* term, 1774, with the following return endorsed: "In obedience to the within writ, I have seized certain lands of the within named *George Croghan*, in my bailiwick, of the value of one thousand pounds, which remain unsold for want of buyers." A writ of *venditioni exponas*

A seizure of lands, by a sheriff, under a *fieri facias*, does not devest the estate of the debtor; nor does a sale at auction, by the sheriff, unless the purchase

[* 521]
money is paid and a deed delivered. A sheriff's sale of lands is within the statute of frauds.

Where a sheriff executed a deed for land sold by him at auction, under a *fieri facias*; and delivered it to the attorney of the plaintiff, to be delivered to the grantee, on the payment of the purchase-money; it was held that no estate passed by the deed, until the purchase-money was paid, or condition performed.

A sheriff may deliver a deed as an *escrow*, but the money

must be paid at a day certain, or within a reasonable time, or the sale will be void. What is reasonable time, depends on circumstances; but it seems that it cannot extend beyond the return day of the *venditioni exponas*, or at most, the next vacation.

By the act of attainder and confiscation, of the 22d *October*, 1779, a mere condition did not become forfeited, so as to vest in the people of the state the right to perform it. Where a person purchased land, at a sheriff's sale, in 1774, and a deed was delivered to a third person, to be delivered to the grantee, on payment of the purchase-money, and the purchaser did not pay the money, but was, afterwards, attainted, in 1779, it was held, that the state could not, by paying the money, perform the condition, or devest the estate of the original debtor or his heirs. And that a private act of the legislature, passed on the petition of the judgment creditor, directing the land to be sold, and the money to be paid to the creditor, did not take away the rights or interests of the debtor or his heirs, or affect any person not a party to the act. (a)

(a) Vide *Simonds v. Catlin*, 2 *Caines*, 61. *Jackson v. Catlin*, 2 *Johns. Rep.* 248. See also 2 *R. S. 370*, sec. 42. *Id.* 373, sec. 61, 62.

IN ERROR.

ALBANY,
Feb. & March,
1911.

CATLIN
v.
JACKSON.

[* 522]

was thereupon issued, in the same term, directed to the sheriff, commanding him to sell the lands, and have the moneys arising from the sale, before the court, on the third *Tuesday of July* then next. On the thirteenth and fourteenth *July*, 1774, the sheriff sold, at public auction, several parcels of the lands, and among others the premises in question, to *Thomas Jones*, being the highest bidder, for £942 4s. 8d. The following return was endorsed by the sheriff, on the writ of *venditionis exponas*: "By virtue of the within writ to me directed, I have exposed to sale the lands and tenements within mentioned, of the within named *George Croghan*, and have thereupon caused to be made the debt and damages within written, which certain moneys before our lord the king, at the day and place within contained, I have ready, as within commanded." But the writ and return were not filed until the twenty-second day of *March*, 1788. On the ninth *November*, 1774, the sheriff made, sealed and delivered to *James Duane*, (who was the attorney of *William Peters*,) as an *escrow*, to be delivered to *Thomas Jones*, the purchaser, whenever the consideration money should be paid to the said *James Duane*, a deed-poll of the lands so seized and sold by virtue of the said execution. This deed recited a subsequent judgment against *Croghan*, in favor of *John Morton*, and a mortgage of the premises, dated the fourteenth *February*, 1779, from *Croghan* to *Goldsbrow Banyar*, for securing the payment of £840, and that the sale was made by the consent of *Banyar*, to pay the debts, according to their legal priority. The deed acknowledged the receipt of the consideration, and a receipt was endorsed by the sheriff, in full of the consideration money of £952. 4s. 8d. A release from *Banyar* to *Jones*, dated thirtieth *November*, 1774, was also endorsed, and delivered also to the said *James Duane*, as an *escrow*, to be delivered to *Jones*, whenever the consideration money mentioned in the sheriff's deed, should be paid by *Jones* to *Duane*. The execution of these deeds was proved by *John Lansing*, junior, one of the subscribing witnesses, and a certificate of the proof was endorsed, as follows: "Be it remembered, that on the fifth of *October*, 1789, appeared before me, *Jeremiah Lansing*, one of the masters in chancery in the state of *New-York*, *John Lansing*, junior, Esq. who, being sworn, &c., deposeth and saith, that he saw *Alexander White*, Esq. within named, execute and deliver to *James Duane*, Esq. the within deed, as an *escrow*, to be delivered to the within named *Thomas Jones*, Esq. whenever the consideration money, therein mentioned, should be paid by the said *Thomas Jones* to the said *James Duane*, and that he the said *John Lansing*, jun. and *John Roberts*, jun. subscribed their names *as witnesses thereto: and that he also saw *Goldsbrow Banyar*, Esq. execute the release, &c., and deliver the 400

[* 523]

same to the said *James Duane*, as an *escrow*, to be delivered to the said *Jones*, whenever the consideration should be paid by the said *Jones* to the said *Duane*, &c. And upon this certificate, the deeds were recorded, on the eleventh *November*, 1794, in the office of the clerk of the county of *Montgomery*, pursuant to the directions of the act of the legislature, hereinafter mentioned. Before the payment of the consideration money, and while the deeds were held and retained by *Duane, Jones*, by virtue of an act of the legislature, entitled, "An act for the forfeiture and sale of the estates of persons who have adhered to the enemies of this state, and for declaring the sovereignty of this state in respect to all property within the same," passed the twenty-second *October*, 1779, was *attainted* of the offence of adhering to the enemies of the state. On the twenty-second *March*, 1788, an act of the legislature was passed, entitled, "An act for the settlement of public accounts, and for other purposes therein mentioned;" the section of which act, relative to the subject, was as follows: "And whereas *William Peters*, of the city of *Philadelphia*, hath, by his petition to the legislature, represented, that, previous to the late war, he obtained a judgment in the Supreme Court, against *George Croghan*, in which suit a writ of *renditioni exponas* issued to the then sheriff of the then county of *Tryon*, on which writ was endorsed the sum of £2,241, 0s. 4d. 1-2, as the amount of the principal, interest, and costs, to be levied thereby; that by virtue of the said writ, *Alexander White*, Esq., the then sheriff of the said county, seized and sold certain lands of the said *George Croghan*; at which sales *Thomas Jones* became a purchaser to the amount of £942 4s.; *John Claus*, to the amount of £66 13s. 4d.; *Stephen Delancy*, to the amount of £75, and *Richard Duncan*, to the amount *of £234; and the said *Alexander White*, on the ninth day of *November*, in the year 1774, executed conveyances to the said several purchasers, for the lands by them respectively purchased; and he delivered the same to *James Duane*, the attorney to the said plaintiff, as *escrows*, to take effect on the payment by the said purchasers severally, of the purchase-money from them respectively due. That the said purchasers not having paid any part of the said purchase-money, the said conveyances still remain in the hands of the said *James Duane*; and the plaintiff in the same suit, by reason of the troubles which soon after took place, and of the attainder of the said *Thomas Jones, John Claus, Stephen Delancy*, and *Richard Duncan*, hath been prevented from taking measures for compelling them to pay the amount of the purchase-money due from them respectively, or for effecting a payment of the moneys recovered in the said suit; and therefore prayed the interposition of the legislature in his behalf.

*IN ERROR.*ALBANY,
Feb. & March.
1811.CATLIN
v.
JACKSON

[* 521

IN ERROR.
ALBANY,
Feb. & March,
1811.

CATLIN
v.
JACKSON.

[* 525]

Therefore, *be it further enacted by the authority aforesaid*, that it shall be lawful for the surveyor-general, as soon as conveniently may be after the passing of this act, to sell, in the manner directed by an act, entitled, "An act for the speedy sale of the confiscated and forfeited estates within this state, and for other purposes therein mentioned, passed twelfth *May*, 1784," the lands so purchased by the said *Thomas Jones, John Claus, Stephen Delancy, and Richard Duncan*, and to pay out of the moneys arising by such sale, to the amount of £1,317 17s. 4d.; being the whole amount of the purchase-money so due as aforesaid, with lawful interest for the same, from the said ninth day of *November*, in the year 1774, to the judgment creditors of the said *George Croghan*, or his assigns, according to the priority of their respective judgments remaining unsatisfied, and to pay the overplus of the said moneys, if any there shall be, into the treasury of this state. *Provided*, that such payments shall not be made *to the said creditors, until he the said *William Peters* shall have delivered to the commissioners, the said conveyances from the said *Alexander White*, duly proved or acknowledged, and also the said writ of *venditioni exponas*. *And provided further*, that moneys only consisting in gold or silver, or bills of credit of this state, shall be received by the commissioners in payment on the sales. *And provided further*, that the conveyances from the commissioners in this case, shall not be deemed to operate as warranties from the state. And the commissioners shall accordingly insert in the conveyances, the words, "these presents are in nowise to operate as warranty," immediately before the words "in witness."

And be it further enacted by the authority aforesaid, That the said surveyor-general shall cause the said writ of *venditioni exponas* to be filed in the office of the clerk of the Supreme Court of this state, and the clerk of said court is hereby required to receive and file the same writ accordingly. And the surveyor-general shall cause the said conveyances from the said *Alexander White*, to be recorded in the office of the clerk of the county of *Montgomery*, the expense thereof to be defrayed out of the moneys to arise by the said sales to be made by the commissioners as aforesaid."

On the seventh *January*, 1789, the lands mentioned in the act, were exposed to sale at public auction, by the surveyor-general, and *James Duane*, as the highest bidder, became the purchaser, for the sum of £2,445, and the surveyor-general, on the eighth *September*, 1795, executed a deed to *James Duane*, for the same lands, pursuant to the directions of the act. *Duane*, afterwards, on the ninth *November*, 1795, executed a deed for the same lands, to *Richard Peters, James Biddle, and John Barclay*, the legal representatives of the

said *William Peters*, under whom the plaintiff in error entered, and held possession. The heirs of *George Croghan*, claiming the *lands by descent, are lessors of the plaintiff below, the present defendant in error.

The *reasons* for the judgment of the Supreme Court were stated by the *Chief Justice*, and were the same as were delivered by him in the court below, and are to be found in the report of the case. (2 *Johns. Rep.* p. 248.)

Colden, for the plaintiff in error. The plaintiff below had no right of entry; for it was taken away, 1. By the seizure and sale under the execution; 2d. By the deed to *Jones*; 3d. By the act of the legislature.

1. Our statute makes no particular provision, as to the manner of selling lands under an execution. The practice has uniformly been to issue a *fieri facias* against lands, in the same manner as against goods and chattels. There is no distinction between them, in this respect. By the seizure of goods under an execution, the title of the debtor or owner is devested, and the goods are said to be *in custodia legis*. By a lawful seizure, the property of the debtor is devested, and the sheriff is answerable to the plaintiff for the value. (2 *Saun.* 47, and note. 6 *Mod.* 296. 2 *Mod.* 236. *Ladd v. Blunt*, 4 *Tyng's Mass. Rep.* 402.) If, then, the possession of the property, after the seizure, was out of the debtor, and in the sheriff, the lessors of the plaintiff would have no right of entry. It is not denied, and seems to have been taken for granted, in the case of *Simonds v. Catlin*, (2 *Caines*, 61,) that were it not for the statute of frauds, a sale by the sheriff would be a conclusive transfer of the title of the debtor. In that case, the court were of opinion, that some deed or note in writing was necessary to take a sale by a sheriff out of the statute of frauds. Lord *Hardwicke*, in the case of *The Attorney-General v. Day*, (1 *Ves.* 218. 221. See *Rob. on Frauds*, 115,) said, that a *judicial sale* was entirely out of the statute. It is true the *Chief Justice*, in the case of *Simonds v. Catlin*, seems to think the case of *The Attorney-General v. Day* obscure, and the opinion of Lord *Hardwicke* not an authority to that point. But *I see no obscurity in the case, and the reason of the opinion given by Lord *Hardwicke* is to be found in the language of our statute, that it shall not apply to estates created by the *act and operation* of law. The *Chief Justice*, it is true, considers these words as strictly technical, and confined to estates by *curtesy*, in *dower*, or those created by a *remitter*. But a sale by a sheriff is by *act of law*.

In *McDougall v. Striker*, (1 *Johns. Rep.* 42. See *Jackson v. Sternbergh*, 1 *Johns. Cas.* 153,) it was decided, that a purchaser of real property, under a *fieri facias*, might enter and

IN ERROR.
ALBANY,
Feb. & March.
1811.

CATLIN
v.
JACKSON.

[*527]

IN ERROR.

ALBANY,
Feb. & March,
1811.

CATLIN
v.
JACKSON.

keep possession of the land, in a peaceable manner; and in *Taylor v. Cole*, (3 *Term Rep.* 292,) it was held, that the purchaser might so enter and expel the debtor, and to an action of trespass, might plead that it was his soil and freehold. The sheriff may turn the debtor out of possession. Though a distinction has been made, in regard to sales at auctions, between lands and chattels, as to the operation of the statute of frauds, yet that distinction has, by later decisions, in *England*, been done away. (*Rob. on Frauds*, 115, 116.)

Admitting, however, that sheriffs' sales under execution, are within the statute, and that some note in writing is requisite, still, we contend, that the deed, even if it was an *escrow*, was a sufficient note or memorandum in writing. (*Shep. Touch.* 60. 2 *P. Wms.* 243.) It contained every requisite of a note in writing within the statute. But was this deed an *escrow*?

LEWIS, Senator. As the special verdict finds the fact, that it was delivered as an *escrow*, can it be now questioned?

[* 528]

Colden. We contend that it may. The special verdict, in one place, it is true, finds it an *escrow*; but in several other places the jury call it a *deed*; and they have found all the facts necessary to constitute a *deed*. The jury say that the sheriff made, sealed, and delivered, as an *escrow*, to *James Duane*, his certain *deed-poll*, which is set forth in the verdict. It was to be delivered to **Jones*, on payment of the consideration money to *Duane*, the *attorney of Peters*. The sheriff had executed all his functions, by delivering the conveyance *as a deed*, at that time; and not to become a deed, on any future contingency or event. The consideration money was not to be paid to the sheriff, but to *Duane*, the *plaintiff's attorney*, evidently as a security for the payment to *Peters*. There is a clear distinction between an instrument delivered to a third person, to take effect, as a deed, upon the doing of some future act by the grantee, and an instrument declared to be the deed of the grantor, and which he delivers to a third person, to be delivered, by that person, to the grantee, upon the payment of a sum of money due from him to the person with whom the deed is deposited. In the first case, the instrument is conditional, and nothing passes till the condition is performed; and until that is done, the grantor may plead *non est factum*. But in the second case, the delivery of the deed by the grantor, *as a deed*, and the depositing of it in the hands of a third person, for the grantee, upon the payment of money to the person with whom it is deposited, constitutes a *trust*. The grantor is *estopped* to say it is not his deed, and the person entitled to the consideration money may enforce payment in a court of chancery, or obtain a decree for the sale of the lands so con-

veyed, in the same manner as in the case of a deposit of the title deeds of an estate, as security for a debt without any writing, which has been determined to be equivalent to a mortgage, and to create a *lien* on the estate itself.

ALBANY,
Feb. & March
1811.

CATLIN
v.
JACKSON.

The law required great strictness and formality in the delivery of a deed as an *escrow*. (13 *Vin. Abr. Fait*, (M.) pl. 7. (N.) *Perk.* 142, 143, 144.) If a grantor deliver his deed to a third person, to be delivered to the grantee, on some future event, or the performance of some condition, it is the grantor's deed presently, and the third person is a trustee for the grantee. (*Shep. Touch.* 58, 2 *Tyng's Mass. Rep.* 447. 451.) Though, perhaps, all the formality stated by *Sheppard* may not be requisite, yet the grantor should call the writing an *escrow*, *and deliver it to a third person, as such. If he is silent, it will be considered as his deed. (*Com. Dig.* 326. *Fait*, (A.) 3. *Cruise's Dig.* tit. 32. c. 2. s. 1.) From the nature of this transaction, the writing must have been intended as a deed, and delivered as such. It has been improperly called an *escrow*; and calling a deed an *escrow* does not make it such. That depends on the language used, and the manner of delivery.

3. As to the act of the twenty-second *March*, 1788. Whether the writing executed by the sheriff was a deed or an *escrow*, *Jones* had a claim to the land that would have been enforced in a court of equity. He had an equitable interest, which was the subject of forfeiture.

The thirteenth section of the act of the twenty-second *October*, 1779, declares, that "all titles, estates, and interests, by executory devise, or contingent remainder, shall, on conviction, be as fully forfeited," &c. "as any other titles, claims, estates, or interests whatsoever."

The *condition* in this case was the payment of the consideration money. This was not a personal condition, or inseparable from the person attainted. It could be performed by one person as well as another. The legislature had power to declare the true construction of the act of confiscation; to say that the claim or interest of *Jones* was within that act; and to perform the condition. Will it be said that the legislature had no power to do this? Is not the legislature, in this respect, omnipotent? The council of revision was provided as a check to prevent unconstitutional laws; but if, after a law has been sent back to the legislature, by the council of revision, and is then passed by two thirds of the legislative body, will it be said that the Supreme Court can declare such a law to be unconstitutional?

Henry, contra. The plaintiff in error, to prevail, must show that the title to *Croghan* has been divested. It is said

[* 529]

*IN ERROR.*ALBANY,
Feb. & March,
1811.CATLIN
v.
JACKSON.

that the right of entry was taken away by the *seizure* under the *fieri facias*, because the possession was *thereby transferred, and the lands remained *in custodia legis*. But a mere seizure does not take away a right of entry. An entry may be tolled in three ways only; by disseisin and a descent cast; by an adverse possession for twenty years; or by devesting the title.

By the statute of 5 *Geo. II.* which first authorized the sale of lands, in the then *British* colonies, for debts, judgments were made a *lien* upon lands only from the time of docketing. Our statute, which is a transcript of 5 *George II.* gave the same effect to a *fieri facias*, in regard to lands, as to chattels, so far as to make them saleable for debts. By the common law, lands could not be *sold* for debts; they could only be *extended*. An *elegit* was first given by the statute of *Westm. 2.* (13 *Edw. I.*) c. 18. By this statute, at the election of the plaintiff, a moiety of the debtor's lands may be delivered to the creditor, until the debt is paid out of the profits. But in *England*, under an *elegit*, the sheriff delivers the *legal possession* only; and in order to obtain the actual possession, the plaintiff must bring an action of *ejectment*. (3 *Term Rep.* 295 2 *Eq. Cas. Abr.* 381.) The sheriff cannot turn the debtor out of the possession of his freehold.

There is a great difference between the seizure of goods and of lands. By the seizure of goods, the possession is devested, and the goods are placed *in custodia legis*. It is not so in regard to lands. The seizure of lands does not change the possession. Could the sheriff maintain *trespass* for entering on lands, after a seizure by him, under a *fieri facias*? He has only a power to sell them; and by a sale and conveyance of the title, the possession is transferred to the purchaser, who may then enter on the debtor.

The jury do not find the fact of a consummated sale, or the payment of the purchase-money. They find only the evidence, arising from the endorsement on the deed, of its being delivered as an *escrow*. The fact ought to have been found substantially; not the evidence merely. *Not only the sheriff's deed, but the acts of *Peters*, showed clearly, that *Jones* had not paid the consideration money when he was attainted. Here then was a sale only, and a delivery of the writing *as an escrow*; but no consummation of the sale. Sheriff's sales are within the statute of frauds, (2 *Caines*, 61. *sess.* 10. c. 44. s. 9, 10, 11. [2 *R. S.* 134. s. 6. *Id.* 135. s. 8]) the ninth, tenth, and eleventh sections of which are taken from the first, second, and third sections of the stat. 29 *Car. II.* c. 3. Was there any note or writing to bind the parties? Was *Jones* bound? He signed no writing. The sheriff signed no writing, except the return to the execution, which merely mentioned the sale

The words "act and operation of law," in the tenth section of the statute, are used in contradistinction to the act and operation of the party. The two words are synonymous. The counsel for the plaintiff in error has endeavored to wrest their meaning in support of his argument. But the obvious and clear signification of them is stated by the *Chief Justice*; and they refer only to estates by *curtesy*, *dower*, &c. created by mere operation of law.

When land is struck off, at auction, to the highest bidder, it is a mere agreement or contract; and there is no conveyance or assurance, until the money is paid, and a deed executed and delivered. Sales of land at auction are within the statute of frauds, except when made under a decree of the Court of Chancery; and a receipt of the auctioneer for the deposit money has been held not to be a sufficient agreement in writing to bind the vendor. (12 *Vesey*, jun. 467. 471. 1 *Vesey*, jun. 221.)

So, a sale of land, by a sheriff, is a mere contract; and to pass any estate, it must be consummated by an *assurance*. At common law, no estate of freehold could pass without a common assurance, stating the names of the parties, the consideration, a description of the premises, the nature and extent of the estate conveyed, &c. So under the statute of *uses*, there must be a covenant containing all the requisites of an assurance; and if there is a *bargain* and *sale*, it must also be in writing. Before the *statute of frauds, assurances might have been by *parol*, accompanied with *livery of seisin*. But since that statute, every conveyance of land must be in writing. A sheriff, selling under a naked power, must make an assurance in order to pass the freehold; for if he does not describe the nature and extent of the estate, no fee will pass. If he intends to convey the *fee*, there must be words, clearly showing that he means to pass the inheritance. (2 *Bl. Comm.* 297. *Rob. on Frauds*, 270, 271, 272. 4 *Cruise's Dig.* tit. 32. c. 1, 2.)

It follows, that the seizure of the sheriff is not even evidence of a contract. The sale is void as an agreement, within the statute; and for a stronger reason, it is void as an assurance.

Then, was the writing executed by the sheriff a deed, sufficient to vest an estate in the purchaser? The jury have found the fact, that it was delivered as *an escrow*. They were competent to do so; and the court cannot now examine the evidence, in order to ascertain whether it was *an escrow*. Where an instrument is delivered to a third person to keep, until something is done by the grantee, it is an *escrow*, and does not take effect, as the deed of the grantor, until the condition is performed. (1 *Inst.* 36. a. *Shep. Touch.* 56, 57, 58,

IN ERROR
ALBANY,
Feb. & March,
1811.
CATLIN
v.
JACKSON.

[* 532]

IN ERROR. 59. *Cruise's Dig.* tit. 32. *Deed*, c. 2. s. 54, 55, 56.) *Duane* is described as the attorney of *Peters*; but he was a *third* person, and a stranger to the grantee. That is sufficient to render the writing an *escrow*.

CATLIN
v.
JACKSON.

It is said, if the writing was not a deed, it was, at least, an agreement, which might be enforced in a court of equity. But the grantee never signed the agreement, so that the sheriff could not enforce it against him; and *Jones* could not compel a performance on the part of the sheriff, without paying the purchase-money. Admitting, however, that it was an agreement which might be enforced in equity, this court, sitting as a court of law, cannot take notice of an equity, or trust, nor compel a specific performance. The only question in an action of ejectment is, who has the legal right to the possession. (2 *Johns. Rep.* 84. 86.)

[* 533] The plaintiff, if he takes the deed, must take it according to the *proof*, which shows that it was delivered as *an *escrow*, or according to the finding of the jury. It was clear that the delivery was conditional, depending on the payment of the money; and it was for the interest of the creditor that it should be so.

It is not pretended that the writing from *Banyar* was not delivered as an *escrow*, and the deed of the sheriff was the same.

There is no evidence of any intention, on the part of the sheriff, to pass the estate, until the money was paid; nor that *Jones* assented to the delivery, as a deed. It is not like a deposit of little deeds, which has been considered as a mortgage in equity. *Duane* was the mere depositary of the deed.

Then was the condition performed, so as to give effect to the deed, as an absolute conveyance?

The sheriff cannot sell on a credit. He is commanded to have the money in court, by a certain day. It is the duty of the purchaser to pay the money immediately, or within a reasonable time. What is reasonable time, is a question of law. (6 *Comyn's Dig.* 334. *Temp.*) The payment of money, and the delivery of deeds, are transitory acts; and the condition being transitory, on the performance of which an estate is to vest, must be performed presently, or in a reasonable time. (1 *Bac. Abr.* 425. (*Cond.*) *P.* 8.) Four years elapsed, after the sale at auction, before the attainer of *Jones*, and the money was not then paid. By lapse of time, the condition was gone. *Jones*, by his neglect, lost the benefit of it. But it may be said that *Jones* had during his life to perform, unless quickened by request. This privilege could not descend to his heirs. (Co. *Litt.* 208.) *Jones*, by his attainer and banishment, was *civilly dead*, (1 *Bl. Comm.* 183. Co. *Litt.* 133,) and could not perform the condition, nor could his heirs or

executors. And where a condition is precedent to the taking of an estate, a court of chancery cannot relieve, in case of non-performance. (1 *Salk.* 231.)

Again, it is said, that by the act of attainder, the state acquired a right to perform the condition and take the land. This act is to be construed strictly. The words are, *that "all and singular the estate, both real and personal, held or claimed, &c. whether in possession, remainder or reversion, within this state, on the day of the passing of this act, shall be, and are, &c. declared to be forfeited, and vested in the people of this state."

Had *Jones*, at the time of the attainder, any estate in possession, reversion or remainder, in these lands? Future acquisitions were not touched by the act.

The thirteenth section extends to executory devises, and contingent remainders. A right to perform the condition was personal, and could not pass to the heirs of *Jones*. It was not an *assignable* interest. *Jones* had no *real estate*, which alone was forfeited. If he had such an estate, it might have been taken in execution.

In *England*, before the statute of 33 *Hen. VIII.* by an act of attainder of all *hereditaments*, a condition was not forfeited, though it was admitted that a condition was a *hereditament*. So the statute of 26 *Hen. VIII.* declared, in cases of high treason, that "all lands, tenements, hereditaments, by any right, title, or means whatsoever, &c. should be forfeited; yet it was held not to extend to conditions. (*Winchester's* case, 3 *Co. 1. 3 Inst.* 19. 1 *Hale's P. C.* 240.) Yet the words of that act are broader and more comprehensive than our act of confiscation.

That no estate could vest in *Peters*, under the private act of the twenty-second of *March*, 1788, is clear, from the very language of the act. The legislature do not assert any right or title; the act is declared to be passed on the petition of *Peters*; and it expressly guards against any warranty. It amounted, at most, to a mere *quit-claim*, and gives no title, not before vested in the state.

T. A. Emmet, on the same side. The question is, whether *Croghan*, or his heirs, have ever been divested of the freehold in these lands.

In regard to goods and chattels, it is true, the right of possession is in the sheriff, by a seizure; but a freehold *never vests by a mere *seizure*. This distinction is laid down by the court, in the case of *Ladd v. Blunt*, decided in *Massachusetts*. It is the common law doctrine. The statute making lands liable for debts did not alter the common law as to common assurances of lands. The distinction is founded on

IN ERROR.ALBANY,
Feb. & March;
1811.CATLIN
v.
JACKSON.
[* 534]

[* 535]

IN ERROR
ALBANY,
Feb. & March,
1811.

CATLIN
v.
JACKSON.

the nature of the two kinds of property. Personal chattels pass by mere delivery. To prevent goods from being transferred by the debtor, they are made liable, from the test of the *fi. fa.* or the delivery of the writ to the sheriff. Lands are bound by the docketing of the judgment, so as to prevent any subsequent alienation by the debtor, to defeat the creditor. When lands are thus held by the judgment, there is no necessity to extend to them the doctrine as to a *fi. fa.* or *extent*, in regard to goods. If the land is in the custody of the law, it is from the time of docketing the judgment, when the law first lays its hands upon it. A *fieri facias* does not touch lands. It is mere process to obtain a *sale* of them. Suppose an action of ejectment, and a demise laid after a judgment docketed against the lessor, or a *fieri facias* issued, would that defeat the action, by showing a title out of the lessor?

Again, may not the debtor, after a judgment, and a *fieri facias* issued, distress for rent? But could the sheriff distress for rent, or bring an action of trespass? The sheriff is the mere instrument of the law, to transfer and pass an estate in the land; but he has no estate himself, by virtue of the execution. A sale at auction by him, without a deed or assurance, will not, therefore, pass the land. The sheriff has a mere power to sell and transfer, by virtue of the writ; and nothing passes until the purchase-money is paid, and a deed is executed. A contrary doctrine would be impolitic and unjust. If a mere sale of land, at auction, by a sheriff, without payment of the money, transferred the land to the purchaser, the land could not be again sold, in case the money should never be paid. The debtor, the sheriff, and the purchaser, might all become insolvent after the sale, and the purchase-money never be paid. And shall the creditor, then, lose his security in the land? In *Simonds v. Catlin*, the sale is supposed to be consummated, by the payment of the money; and the court then say, the estate does not pass, without a deed from the sheriff. In the present case, the sale never was consummated by a payment of the money. The power of a sheriff is very different from a power under the statutes of *uses* and *wills*. It is a power created by law, for public purposes, and is to be regulated by public policy. The law is to decide what is to be a complete execution of the power. Public policy, and the security of the creditor, require that the land of the debtor should not pass, until the money is paid, and the power of the sheriff executed. A power created by a party, is for his own purposes; and is regulated by his own will and caprice; and to suppose any analogy between these different kinds of powers would be dangerous and fallacious. All public officers who sell, for public purposes, execute their power, by means of a *conveyance*. Such is

[* 536]

the doctrine laid down in *Simonds v. Catlin*; and it is applicable to sales by sheriffs:

Admitting this *escrow* to be a note in writing, yet it is not sufficient, unless the power has been completely executed. It is evidence only of an incomplete agreement. It is not evidence of an agreement at common law; but merely in equity. All the cases on the other side refer to a specific execution of the agreement in a court of equity. They do not apply to the question, in whom is the legal estate vested?

Again, the statute of frauds did not mean to create any new assurance; but only to destroy conveyances by *parol*. A note in writing might supersede the *parol*; but could not supersede the necessity of a *livery of seisin*. A freehold must still pass by *livery of seisin* or by a *deed*.

*The words "act and operation of law," do not apply to sheriffs' sales; for we find the same words in the *English* statutes, though in *England* lands could not be sold on a *feri facias*. But the law will not operate injustice, or put a man out of possession, before the money is paid, or the power completely executed:

The observation of *Lewis, J.* in the case of *Jackson, ex dem. Kane, v. Sternbergh*, (1. *Johns. Cas.* 153,) that the purchaser came in under a paramount title, is a mere *dictum*. The other judges were of opinion that he came in under the debtor. If a purchaser comes in by a paramount title, it overreaches every other title, and he will take the land free from all prior encumbrances of the debtor. Not so; if he comes in under the debtor. The sheriff's deed conveys no more than the title of the debtor.

The special verdict has found that the deed, or writing, was delivered as an *escrow*. Though in other places it is called a *deed*, it does not vary the case. A *deed* is a generic term, for a writing sealed and delivered. The delivery may be absolute or conditional.

All the books use the word *deed*, when speaking of an *escrow*. They speak of a *deed* delivered as an *escrow*. (*Perk.* s. 4. 11. 138. 142. 4 *Cruise*, 29. tit. 32. c. 22. s. 54. 56; 57, 58. 13 *Vin. Abr.* 24. (M.) *Shep. Touch.* 50.) A delivery of a *deed* to a stranger, unless accompanied with words of absolute delivery, is not absolute. Deeds delivered on conditions, are sometimes held to be *deeds*, not *escrows*; but then they are delivered expressly as *deeds*. In the case of *Wheelwright v. Wheelwright*, (2 *Mass. Rep.* 447,) the witness swore that the *deed* was delivered to the third person, for the use and benefit of the grantee; and the grantor had acknowledged, before a justice of the peace, that it was his *act and deed*.

It is said, if this *deed* was delivered on condition, or as an

IN ERROR.

ALBANY,
Feb. & March,
1811.

CATLIN
v.
JACKSON.

[* 537]

IN ERROR.

ALBANY,
Feb. & March,
1811.

CABLIN

v.

JACKSON.

[* 538]

escrow, that the condition has been performed by the state. Whatever right the state possessed was acquired by the act of confiscation, and in no other way. That act created a new offence, and a forfeiture of certain estates. The common law doctrine, as to forfeitures and high treason, is inapplicable. The act is to be construed strictly; and nothing which is not forfeited, in express terms, can be deemed to be vested in the state.

But all the writers on the common law agree, that a condition cannot be forfeited, not even under the word *hereditament*. The English authorities, therefore, adduced on the other side, are not to be regarded. We are only to look to the act of the legislature, to ascertain what the state did acquire. The first section reaches only to vested estates in possession, reversion or remainder. The thirteenth section extends the forfeiture to executory devises and contingent remainders. There are no words which can authorize the supposition, that the state became vested with a condition.

Again, when the act of 1788 was passed, on the petition of *Peters*, the legislature were disabled, by the fifth and sixth articles of the treaty of peace of 1783, from vesting in itself any confiscated estate. By the constitution of the *United States*, all public treaties are declared to be the supreme law of the land; and no state legislature can pass a law to contravene them.

Admitting, then, that in 1788, there was a condition to be performed, on the part of *Jones*, or his heirs, this state could not take away the right to perform that condition; and thereby gain the estate to itself. This would amount to a further confiscation. The right was in the heirs of *Croghan* or in *Jones*; and by the interference of the state, if allowed, the right of one or the other must be destroyed, against the express stipulation of the treaty, and in violation of the supreme law of the land.

Did the state, in fact, perform the condition? The payment of the money was a condition precedent, before any estate could vest; but the legislature first take the land, and order it to be sold. Before Queen *Elizabeth* took possession of *Englefield's* estate, she first performed the condition by tendering a gold ring. (7 Co. 21.)

[* 539]

*Again, it has been shown that before the state interfered, the condition was gone, by lapse of time.

But a doctrine bold, unprecedented and dangerous has been advanced, that the legislature have a right, absolutely, to take the property of one person, not for a public purpose, and give it to another. Under our free constitution, such a doctrine can never be admitted. The opinion of Sir *Matthew Hale*, that a statute is in the nature of a judgment, may be

law in *England*; but in this state, where the constitution has IN ERROR. separated the legislative and the judicial powers, courts can neither nibble at the legislative power, nor can the legislature stride over the judicial.

ALBANY,
Feb. & March
1811.

CATLIN
v.
JACKSON

The legislature cannot establish a new court, which is not to proceed according to the course of common law. By what authority, then, can the legislature erect itself into a court acting, not according to the common law, but arbitrarily and unjustly taking away the property of the heirs of *Croghan*, unsummoned, unheard, and without any compensation? *No scire facias* was issued; nor any notice given to the heirs of *Croghan* to show whether they had paid the amount of the judgment, or not. This act, if it was intended thus to violate private right, was legislative robbery. But the legislature did not mean any such thing; nor have they done any such act of injustice. For nothing but the clearest and most express words can ever authorize so injurious a construction.

But admitting, for a moment, that the legislature did intend to devest this estate, they have overshot their mark, and failed. The act directs the surveyor-general to sell the land, according to the directions of another act, passed the twelfth *May*, 1784, (*Greenleaf's edit. Laws*, vol. 1. p. 127. *sess. 7. c. 64.*) which directs seven commissioners to be appointed, called commissioners of forfeiture, for the several districts of the state, and who are authorized and required to sell all the forfeited estates, and to execute deeds to the purchasers. On *the twenty-first *March*, 1788, a law was passed, that the office of the commissioners of forfeitures should be finally closed, in *September*, 1788; and no provision was made in the act of the twenty-second *March*, 1788, for a conveyance by the surveyor-general. It is true that the act of twenty-first *March*, 1788, provides, that all *forfeited estates*, to be sold after *September*, should be sold by the surveyor-general, who should be vested with the same powers, in that respect, as the commissioners. But the power of the surveyor-general relates only to estates forfeited, and unless these lands were forfeited, he had no power to convey them. The power of the surveyor-general must be strictly pursued. This being an act to devest a private right, is to be construed *strictissimi juris*. It follows, therefore, that the deed of the surveyor-general is no better than waste paper; and the lands still remain vested in the heirs of *Croghan*.

[* 540]

If the plaintiff in error is without remedy, it is because *Peters* disregarded the ordinary courts of justice, and resorted to an extraordinary legislative remedy, by which to cut the gordian knot of litigation, and has had the *fieri facias* returned satisfied.

If the property was in *Jones*, why did he not come in and

IN ERROR: get his money from the sale of the confiscated estates under the act. Or if the property was in the heirs of *Croghan*, Feb. & March, 1811. why did he not issue a *scire facias*, and proceed, under the judgment, against the property?

CATLIN
v.
JACKSON. But he may, perhaps, have a remedy in equity, or he may apply to the legislature to undo the act; or to the Supreme Court to have the return taken from the files of the court.

Riggs, in reply, said, that in the case of *Simonds v. Catlin*, the court thought it necessary that the *fieri facias*, or *venditioni exponas*, should be returned and filed, in order to make good the title of the purchaser at the sheriff's sale.

[* 541] The judgment in favor of *Peters* was prior to the *mortgage to *Banyar*, and the amount for which the lands were sold was not sufficient to satisfy the judgment; so that *Banyar* could lose nothing by his release.

The jury, it is true, must find the facts and not the evidence; but there is no evidence that the deed was delivered as an *escrow*.

It is said, that the sheriff's sale is within the statute of frauds. But it is not necessary that there should be such an agreement in writing, as could be enforced in a court of equity, against *Jones*. It is sufficient for the plaintiff in error, holding under the sheriff's sale, that there was a note in writing, signed by the sheriff, the party to be bound. The party signing may be compelled to perform, though the other party has not signed. The sheriff was the person bound to perform.

Again, it is said, that without the payment of the money, the sheriff's deed was inoperative. But in *Simonds v. Catlin*, the court were of opinion, that the first deed ought to have been received in evidence, because it went to show that the first sale was valid and binding, and had been carried into effect by the plaintiff's deed.

It is said, that the sheriff's deed ought to specify the nature and quantity of the estate conveyed. But that is not requisite, as he merely conveys all the estate or interest of the debtor, be it more or less.

It is objected, that we claim only an equitable title. But the title of the defendant is a legal purchase and possession, under the sheriff's sale.

Again, it is said, that the money must be paid, in a reasonable time, otherwise the deed is void. But there is no measure of law, by which to ascertain what is a reasonable time. If a sheriff sells on condition that the money is to be paid in a certain time, and the money is not paid at the time, he may resell. Admitting that the money was not paid in a reasonable time, then the title did not pass out of *Croghan*, and the sheriff had a right *to find another purchaser, or resell. Why

may not the legislature find another purchaser, and do what the sheriff ought to have done; sell the land to satisfy the judgment creditor? The legislature may authorize the surveyor-general, instead of a sheriff, to sell land to pay debts.

But it is said that *Jones* was *civilly dead*, and so could not perform the condition; and it being personal, neither his representatives nor any other person could perform it. In *Marks v. Marks*, (10 Mod. 419. 1 Stra. 129. S. C.) where land was devised to *B.* with remainder to *C.*, provided if *D.* paid five hundred pounds to *C.* within three months after the death of *B.*, then *D.* and his heirs should have the land; Lord Ch. *Parker* and Sir *Joseph Jekyll* were of opinion, that the payment of the money was not personal to *D.*, but might be performed by the heir; and though that was an executory devise, yet if it had been a condition at common law, the payment of the money would not be a personal act, but might be performed by the heir.

Again, it is said, that the legislature intended to give a mere quit-claim, and not to convey any title. But it is evident that the legislature meant to do precisely what the sheriff might and ought to have done; and, therefore, directed the surveyor-general to execute such a deed as the sheriff would have given; that is, a deed without warranty, which should convey the debtor's interest in the land.

It is said, that a title cannot pass by a sheriff's sale, without a deed, and that an assurance at common law is requisite to transfer the estate. But by the common law, no person but the owner of the estate, can convey. A sheriff cannot transfer the property of another person. Sheriffs' sales rest altogether on the statute, and are not governed by the rules of common law.

The statute gives a sheriff power to take the land of the debtor, and to sell it, in order to satisfy the creditor. Formerly a court of equity did not feel itself authorized *to transfer a mortgaged estate, but directed the mortgagor or mortgaggee to execute a conveyance. Now, on a sale, the master, under the decree, makes out a perfect conveyance, and delivers or tenders it to the purchaser; and if he refuses to pay the money and take the deed, the master reports the facts to the court, and the master is ordered to resell. May not the estate, after the sale, be considered as vested in the purchaser, subject to be devested by a subsequent sale, in case the money is not paid? The sheriff, or master, is a mere agent of the law, having no title in the property, but merely an authority to convert the property of the debtor or mortgagor, into money, to pay the creditor. A sheriff, then, might, under the deed, sell the estate of the purchaser to raise the money, as well as he

IN ERROR

ALBANY,
Feb. & March
1811.CATLIN
v.
JACKSON.

[* 543]

IN ERROR.ALBANY,
Feb. & March,
1811.CATLIN
v.
JACKSON.

could the estate of the debtor. This removes all difficulties as to the freehold being in the debtor, or in *abeyance*.

The case of *Wheelwright v. Wheelwright* (2 Mass. Rep. 447) is in point, as to the delivery of the deed of the sheriff, and shows that there may be a *conditional* delivery which will vest the estate presently in the grantee. That case was not decided on the doctrine of *estoppel*, arising from the grantor's having acknowledged before a justice that it was his act and deed. In *Jackson, ex dem. M'Crea, v. Dunlap*, (1 Johns. Cas. 114,) this court held, that where a deed was executed and acknowledged before a master in chancery, but retained by the grantee, by way of security, until the consideration money was paid, no estate passed.

Again, it is said, that the surveyor-general had no authority to execute a deed. But he was expressly directed and empowered to sell the land, and pay the money over. He must, therefore, have a power to execute a deed to the purchaser. The reference to the commissioners of forfeiture may have been left in the act, by mistake, and in consequence of not adverting to the act that was passed the day before, for abolishing that office.

Having thus answered particular objections, he proceeded to state the general ground on which the plaintiff *in error relied: 1. That the deed to *Jones* was so far a perfect deed, as to pass the estate to him, by force of the sale. It is true that the jury find the deed was delivered, as an *escrow*, but they also find facts inconsistent with that fact. In judgment of law, from the whole case, it was not an *escrow*; and this court must say that the jury mistook in calling it such. Every thing was done on the part of the sheriff, which was necessary for a perfect conveyance of the estate; and the deed was left with *Duane*, not for the benefit of the sheriff. The money was not to be paid to him, but to *Duane*, the plaintiff's attorney. In *Wheelwright v. Wheelwright*, the witness called the deed an *escrow*, and considered it as such; but the court said that he was mistaken. It depends on what is done, not on what is said, whether the deed is to be considered an *escrow*, or not. (6. Mod. 217, 218.)

2. Suppose the deed was no more than an *escrow*, and that *Jones* had only a right to call on *Duane*, and demand a deed, on payment of the money; then he had a *claim* to the land, which he could enforce, on payment of the money. It has been called a *condition*. True, it was in the nature of a condition, for *Jones* was not to have the land, without paying the money. But it is not that kind of *condition* which is considered in law as not *assignable*. (Co. Litt. 219. b.) It is rather a *contract*, under which *Jones* claimed the estate. It is, in the language of the act of attainder, an estate *claimed*.

though not held. The act of 1788 has given this construction to the act of attainder; and the interpretation having been thus settled by the legislature, all courts must be bound by that construction. And this is the fair and legal construction; for the property so acquired, was to be held by the state, in trust, to pay the debts of the person attainted. In an insolvent act, the words "all the estate real and personal" of the debtor, comprehend every kind of estate whatever, which the debtor could have, for the beneficial purpose of paying his debts.

3. But suppose that nothing passed by the deed to **Jones*, were *Peters* and his heirs to be left without remedy? Is there any thing novel, unprecedented, or unjust, in a legislature passing a law to render perfect an act left imperfect by an officer? Is it not in furtherance of justice? It is, in truth, a plain act of justice. The legislature not only had the power to do this, but they were right in lending their aid to enable a judgment creditor to obtain, in this way, his just debt.

It has been suggested that the Supreme Court may direct the *venditioni exponas* to be taken off the file; but after the legislature has ordered the writ to be placed there, by what authority could the Supreme Court remove it? By direction of the legislature, also, the deed from the sheriff to *Jones* has been recorded, and remains as a matter of record, and a complete bar to *Peters* and his representatives.

Sir *Matthew Hale* says, that parliament have a right, in every case, to settle a controversy, and to decide to whom land in dispute belongs; and no court can ever after call it in question. Our legislature, in this respect, have the same power as a *British* parliament.

The court below say that the legislature have not, in *express terms*, declared that the estate of *Croghan* was devested. But the act must necessarily be so understood; for the directions of the act are utterly inconsistent with the idea of any title remaining in *Croghan*; and the act could have no operation, if the estate was in *Croghan* or his heirs.

THE CHANCELLOR. The questions arising in this case come up on a special verdict, on which a judgment has been rendered in the Supreme Court, for the defendant in error, the lessor of the plaintiff, in the court below.

In examining the errors assigned, which in their form are general, the record *only* affords the test of their existence; and as, in this case, they are assigned on the matter of the special verdict, it will be necessary to attend *to the points found by it, from which it was imposed on the court below, to determine, as a question of law, arising upon the facts found, whether a judgment ought legally to be rendered for the plain-

IN ERROR
ALBANY,
Feb. & March
1811.
CATLIN
v.
JACKSON

[* 545

[* 546]

IN ERROR.
ALBANY,
Feb. & March,
1811.

CATLIN
v.
JACKSON.

tiff, or the defendant; and if, in adjudging on those points, they have erred, it is the duty of this court to correct the error; and if they have not erred, to affirm the judgment.

Both parties having relied on *George Croghan*, as their common source of title, his seisin, and the descent from him to the lessor of the plaintiff, are not matters of controversy; though necessarily found by the jury, as facts essential to be presented to the court. So as to the attainder of *Thomas Jones*, as a person named in the confiscation act.

[Here his honor stated the substance of the special verdict.]

To determine whether the errors relied upon in argument, are such as the judgment of the Supreme Court ought to be reversed, it becomes necessary to examine, 1. Whether the seizure of the sheriff devested the seisin of *George Croghan*?

2. Whether the sale at auction devested it?
3. Whether the sheriff's deed was delivered as an *escrow*; and, if so, what was its legal effect?
4. Whether the act of the legislature, of the twenty-second *October*, 1789, devested the interest of the lessor?

1. Preliminary to the consideration of these points, it will be proper to remark, that the finding of the jury of any fact, as existing, is in exclusion of the inducements to such finding, on a view of the evidence which was the ground of their verdict; that whatever fact is not found, is deemed not to exist, and that the court cannot supply any defects in such finding by intendment.

The first question that presents, is as to the effect of the sheriff's seizure. From the nature of the subject, we cannot expect to find any governing cases among those adjudged in the *English* courts. There are some, however, which have an analogy to it.

Previous to the statute of 5 *Geo. II.* c. 7, no judicial sales of land could be made here, under any common law process; and whether the *elegit* was ever introduced in practice, is doubtful, as the small value of the income of real estates, afforded little inducement to resort to it, as a means of satisfying a debt due upon a judgment; but, upon the passing of that statute, though professedly intended to enable the *British* subjects in *England*, to sell real estates, on execution in the colonies, in order to satisfy the debts due to the former, it received a liberality of construction here, which extended it to all judgments; and in practice it was even applied to the sale of lands of a testator or intestate, on judgments recovered against their executors or administrators, on the ground that the statute had completely converted real into personal estate, as far as respected the satisfaction of debts. Many estates are now held under sales of that kind, and the fifth section of the act pass-

ed the fourth of April, 1786, (*Jones and Varick's edit. Laws of N. Y.* vol. 1. p. 277,) expressly restrains such sales; a restraint perpetuated by an existing statute. (*Rev. Laws*, vol. 1. p. 538. s. 13. *sess.* 24. c. 174. [2 R. S. 449. s. 12.])

The statute, 5 Geo. II. enacts, "that the houses, lands, negroes, and other hereditaments, and real estate in any of the plantations, belonging to any person indebted, shall be liable to, and chargeable with, all just debts, duties, and demands, and shall be *assets* for the satisfaction thereof, in like manner as real estates are, by the laws of *England*, liable to the satisfaction of debts *due by bonds*, or other specialty, and shall be subject to the like *remedies, proceedings and process*, in any court of law or equity, in any of the said plantations, *selling or disposing* of any such houses, lands, negroes, and other hereditaments and real estates, towards the satisfaction of such debts, duties and demands, and in like manner as personal *estates* in any of the said plantations respectively, are *seized, extended, sold, or disposed of* for the satisfaction of debts."

The construction of this statute presents some difficulty. The section quoted is labored and complicated; but it appears to me that the first member of it prescribes both the remedy and mode of seizing, extending, selling or disposing of land which, as far as there are any analogous proceedings in any courts of law or equity, in the plantations, in which the real estate is situated, must be conformed to them; but to prevent all possibility of doubt, it is added, "*and in like manner* as personal estates are *seized, extended, sold or disposed of, absolutely*, so as to pass the whole interest of the debtor to the purchaser.

In several essentials the effect of the execution must be different from a *fi. fa.* levied on personal estate only. The delivery of the *fi. fa.* gives no new rights to the plaintiff, and vests no new interests. The general *lien* it created by the judgment and the execution, is merely to give that *lien* effect, not by vesting a possessory right to the land affected by it, in the plaintiff, but by designating it for a conversion into money by the operation of the *fi. fa.* and the act of the sheriff, by virtue of it. It is not so as to personal property. That is bound from the delivery of the *fi. fa.* to the sheriff. When he seizes, he may remove it for safe keeping, and this not only to give effect to the seizure, but for his own security. He may maintain trover or trespass, for converting or injuring it, on account of the special property he acquires in it by the seizure. (2 *Saund.* 47.) So a carrier may maintain trover against a stranger, who takes away goods held by him to carry; and *Holt*, Ch. J. ruled, that if goods were rescued, the sheriff was not liable, which could not be, if he acquired a property absolute. (1 *Vent.* 52. 1 *Brownlow*, 132.)

IN ERROR.

ALBANY,
Feb. & March,
1811.

CATLIN
v.
JACKSON.

[* 548]

IN ERROR.

ALBANY,
Feb. & March,
1811.

CATLIN
v.
JACKSON.

None of these reasons apply to real estate. It is not necessary that the sheriff should possess himself of it, for safe keeping. It is not possible to eloign it, and *the terms of the *fieri facias* give him no other authority than such as is incident to the duty he is required to perform. The cases from 2 *Show.* 85. and 3 *Term Rep.* 395, show, that, in *England*, upon an *extent*, under an *elegit*, the vendee is put to his ejection; and so has been the practice here, which appears as well from the uniform mode of conducting seizures of real estate, as from some cases reported on that subject.

In practice, the defendant, if he is the occupant, is never disturbed, till the sale is consummated. A contrary practice would expose the defendant's property to waste and destruction, impair the plaintiff's security, and involve the sheriff in very inconvenient and useless responsibilities.

It has been said, that the estate was in *custodia legis*, and in *abeyance*. There is no principle of law, which can, in its operation, devest an estate, to put it in *abeyance*. (*Co. Litt.* 342. *Vin. Abr.* tit. *Abeyance*, pl. 12.) That is produced only of necessity. The law never allows it to be the act of a party; and neither law nor reason exists to justify the application of the doctrine to an act of the sheriff. It is limited to a very few cases; never created *eo instanti*; but is the effect of some contingent event, which would frustrate the purposes of justice, if it was not interposed. If applied to the incongruous operations of *abeyance* and *remitter*, it might be required to co-operate to restore the defendant to the *statui quo*, if, by any accident, a sale should not succeed the seizure, or the debt be satisfied. This species of losing and acquiring *seisin*, cannot be deduced from any legal principle. It is not congenial to the genius of our law, thus to vest and devest a *seisin*, by mere volition, without an act indicating the intent of transferring it from one to the other. The word imports an actual, not an ideal possession; for even an entry for the purpose of asserting a claim, does not *oust* the *seisin* of the actual occupant.

[* 550]

*I am satisfied, that the interest of *Croghan* was not otherwise affected by the seizure, than as it became the inceptive step to a legal transmutation of his estate, if other requisites had followed to consummate it.

2. The second question is, whether the sale at auction devested the *seisin*?

Auction is calculated to ascertain the terms on which property offered for sale is to become the purchaser's.

The terms of payment, quantity, and extent of the interest to be disposed of, are prescribed by the person holding the auction. The bidder consummates them by adding the sum. These, all other legal requisites being complied with, consti-

tute, not a conveyance, but, at most, *a contract for a conveyance*. The one party contracts for the delivery of a conveyance, the other to pay the sum bid, as a concurrent act, at a specified time, or, if without a specification of time, within a reasonable time.

Without the payment of the money, no right can accrue to the purchaser; for, if a bill was filed in chancery for a specific performance by the vendor, unless the terms had imposed on him the delivery of a conveyance, precedent to the payment, he could only be bound to offer it, upon receiving the purchase-money.

If the money is not paid, or if the sale does not operate to satisfy the debt, *pro tanto*, what benefit arises to the owner, as the consideration to him for devesting it?

In *Pennsylvania* (1 *Dallas*, 419) it would be competent for a sheriff to return that the money was not paid, and that the premises remained unsold. In chancery, if the money bid at auction is not paid, it is the uniform practice to annul the sale. In *England*, the biddings are often opened, before the master's report is confirmed, which could not possibly be, if the mere sale at auction vested the seisin in the bidder. A contrary doctrine would render judicial sales intolerably perplexing * to all parties concerned; to the sheriff, because it would expose him to incalculable embarrassments; to the plaintiff, because it would tend to delay the satisfaction of his judgment; to the defendant, because it would place the care and management of his estate out of his reach, long before it could possibly be applied to the satisfaction of the plaintiff, in his exoneration. The doctrine in the extent contended for, would conclude to devest the defendant of his estate, as in this case, from 1774 to 1779, without satisfying a cent of the debt, or even preventing the interest from running against him; for if that was in reasonable time, the mere payment of the sum bid, would entitle the purchaser to a conveyance. In every point deduced from strict law, from its liberal exposition from general principles, or from considerations of inconvenience, this doctrine is unfounded. The defendant *Croghan's* right of entry was not *tolled*, and the descent found by the jury devolved his right upon his heirs.

3. As to the third point, whether the sheriff's deed was delivered, as an *escrow*; and, if so, what was its legal effect?

That the sheriff's deed was delivered to *James Duane*, as an *escrow*, to be delivered to *Thomas Jones*, whenever the consideration money therein mentioned, should be paid by him to the said *James Duane*, is a fact found by the verdict. That the money has ever been so paid, has not been found; and on the performance of the condition of payment *only*, could it operate. If *Jones* was, now, in full life, legally

IN ERROR.

ALBANY,
Feb. & March
1811.

CATLIN
v.
JACKSON.

* [551 .

IN ERROR.

ALBANY,
Feb. & March
1811.

CATLIN
v.
TICKERON.

capable of performing the act required, (the payment,) and if even it were possible to pronounce that it was still competent for him to give the deed effect, by *paying*, the fact, that it was unpaid at the time of the commencement of the action, and not even paid at this moment, must stare him in the face, and repel every pretence that the *deed* could operate in his favor. *Croghan* has never forfeited his estate. *The receipt of the money by the treasurer could not affect his right. It was neither a payment to him, his heirs, or to *Duane*; for so far from being a payment, before the sale under the act of 1788, the right of disposition has been exercised, before any payment made; and to all legal purposes, the consideration money was still unpaid, as related to the condition on which the *deed* was, by its second delivery, to become operative. If so, how can a title be derived under a *deed*, which could not, even now, pass the estate described in it, to the purchaser, were he in full life; and which has never been called into existence by the payment of the consideration money to *Duane*, by the purchaser. If he could not derive a title under it, the persons claiming under him, must, necessarily, be equally destitute of it.

The verdict has found the *deed* of the sheriff, the release of *Goldsbrow Banyar*, and the proof of the execution before a master in chancery; but those facts conclude nothing here; for though they might be inducements to a jury, to find the delivery of the writings as *escrows*, it is not expressed, and cannot be intended, that they were either the sole inducement, or combined with others, to the finding of the delivery of the sheriff's *deed*, as an *escrow*. There might be others, but whether there were or not, the jury have not so found, as to enable this court to judge, whether the inference, that the *deed* was delivered as an *escrow*, was correctly deduced from those facts, or not. The court cannot infer the existence of one fact from another, positively found by the jury, in the matter on which it is required to pronounce the law.

The sale at auction was made before the return day of the *venditioni exponas*. I do not mean to examine whether a sheriff can, on any occasion, legally execute a *deed*, as an *escrow*; though the inclination of my mind is, that he may, limiting it to a day *certaina*, within a reasonable time; for it is no more than the law would impose on him, to offer the *deed*, when he required payment of the consideration money; and the second delivery could only give it operation; or by referring it to a reasonable time, generally; in which case, circumstances must enter into the estimate of what constituted a reasonable time, either the return day of the *venditioni exponas*, or, at farthest, the next *vacation*; and, when that elapsed, the sale might well be considered as inoperative.

The acts of executing the deed, of delivering it as an *escrow*, of retaining it as such, and the neglect of executing a compliance with the condition of the delivery, were exclusively those of the plaintiff's attorney in the suit in the Supreme Court, and of the sheriff; for the defendant *Croghan's* right was treated as extinguished, and with those transactions he had no privity. The real estate remained untouched, the consideration money unpaid, the deed undelivered, the *venditioni exponas* unfiled, and the whole so modelled, as to subserve the view of the plaintiff.

Suppose *Croghan* vigilant and attentive to his interests, of which there is no evidence, and disposed to ascertain the state of his property; by repairing to the clerk's office, he might have discovered that a *venditioni exponas* had issued, but that it had not been returned. By applying to the sheriff, or Mr. *Duane*, if they were alive and accessible, he might have acquired the information that an auction sale had been made; but it must have been the mere effect of candor, if they had gone a step further, and explained the mode to which a resort had been had to devest him of his interest, so as to put it in his power to penetrate the clouds with which his estate was enveloped; and it cannot possibly consist with any legal or rational exposition of the powers of a sheriff, to permit measures of this kind, to devest an estate, after so long a lapse of time. Hence, long before the civil death of *Jones*, the reasonable time in which the deed might have been made absolute, by the *payment of the consideration money, had elapsed. If the purchaser had paid tardily, and *Croghan* or his heirs had laid by, and suffered the lands sold to be occupied under the sale, without interruption, it might present other considerations not necessary to be now pursued.

If nothing passed by the deed, the act of attainder could not create a right, once *in posse*, but never vested, or revive such a one as had been lost by the *laches* of the party in whose favor it was intended to operate, prior to its passing; and however broad and comprehensive the terms of the act might be, it could not affect the estate in question.

By the verdict, it is found that the sheriff returned, that he had the moneys directed to be levied, ready "before our lord the king, at the day and place within contained." The day and place clearly relate to the return day, and to the court then held, at which the *venditioni exponas* was made returnable, and could relate to no other. From the special verdict it appears that the sheriff had seized 40,000 acres of land of the defendant *Croghan*; that he sold divers parcels of it, and, among others, to *Thomas Jones*, the premises in question. There is no fact found to rebut the return, if it could be rebutted or traversed; that he had the money ready at the

IN ERROR.

ALBANY,
Feb. & March,
1811.

CATLIN
v.
JACKSON.

[* 551]

IN ERROR.

ALBANY,
Feb. & March,
1811.

CATLIN
v.
JACKSON.

return day; and if so, the debt was satisfied. His authority had ceased, and the execution of any deed subsequent, would certainly be of questionable validity; for from aught that appears, the debt might have been satisfied by the sale of the other parcels. That the return was not filed till 1788, does not destroy its relation to the return day. It was at most a filing *nunc pro tunc*; and the withholding it from the proper office could not attach any legal effect to it, but such as it would have had if it had been regularly filed.

This leads me to the last point, whether the act of the twenty-second *March*, 1788, devested the lessors' interest?

[* 555]

*It appears, from its terms, to have been passed upon the suggestion and prayer of *William Peters*. It was, as far as it relates to this subject, a private act. It has no saving of the rights of others; but its professed object is to convert the land described in it and in the sheriff's deed, into money; to apply so much of it as might be necessary, to the satisfaction of the consideration money, together with the interest, to the judgment creditors of the said *George Croghan*, or their heirs and assigns, according to the priority of their respective judgments remaining unsatisfied; and to pay the overplus of the said moneys, if any there were, into the treasury of this State. But whether the payment into the treasury was made, for the ulterior benefit of persons interested, or as part of a fund vested in the state, by the attainer of *Jones*, is not expressed; but if for the latter purpose, it must evidently have been under the erroneous opinion that the residuary interest of *Jones* had so vested.

That the state was not to be responsible, is evident from the section expressly imposing a departure from the usual mode of conveyance of forfeited estates, by the omission of the warranty.

The act, for the reasons assigned by the Supreme Court, could not affect *Croghan's* property. It is not its professed object; and no legal intent can be admitted to support a construction so replete with injustice. He was a stranger to the act. A violation of private rights, by legislative acts, is never to be presumed; and a decent respect to that branch of the government of the state, must ever repel a presumption of that kind. In doubtful cases, the court would uniformly give a construction consistent with the provisions of the constitution; and it must be a clear and equivocal intent, which the court would not meet with the most liberal construction, in order to prevent its operating to the prejudice of private right. It is not presumable that the legislature will ever be guilty of such a palpable violation *of the constitution. If they should do so, it may present an interesting epoch in the his-
424

[* 556]

tory of our jurisprudence ; but it cannot be useful to anticipate it.

The present case is that of a private act, passed at the instance of the parties, to remove embarrassments in the arrangements of their interests only, which cannot affect strangers, or devest the rights of others, not parties or privies to it. It is a species of conveyance, which, like all others, the parties take at their peril.

The cautions observed by the *British* parliament, with respect to private acts, are particularly mentioned by *Blackstone*, (2 *Black. Comm.* 345,) under the head of "*Alienation by matter of Record.*" Speaking of private statutes, he says, "Acts of this kind are, however, carried on in both houses, with great deliberation and caution ; particularly in the House of Lords, they are generally referred to two judges, to examine and report the facts alleged, and to settle all technical forms. Nothing, also, is done without the consent, expressly given, of all parties in being, and capable of consent, that have the remotest interest in the matter, unless such consent shall appear to be perversely, and without any reason, withheld. And, as before hinted, an equivalent in money or other estate, is usually settled upon infants or persons not *in esse*, or not of capacity to act for themselves, who are to be concluded by this act ; and a general saving is constantly added, at the close of the bill, of the rights and interests of all persons whatsoever, except those whose consent is so given or purchased, and who are therein particularly named, though it has been holden, that even if such saving be omitted, the act shall bind none but the parties."

He then adds, "A law thus made, though it binds all parties to the bill, is yet looked upon more as a private conveyance, than as the solemn act of the legislature."

*If in *Great Britain*, where all these precautionary measures are taken to preserve the interests of strangers, private acts are restrained to the parties only, who are evidenced to be such, by consent to them, either in person, or by those who legally manage their concerns for them, and if, when the suggestions on which the act is passed are proved fraudulent, a court of chancery will relieve against them, which is there well settled, the general practice, which obtains here, with respect to the passing such acts generally, on the bare suggestion of the applicants, affords additional and very cogent reasons against relaxing such restraints ; and it can scarcely be necessary to add, to devest an interest of a stranger to it, is contrary to the clearest dictates of justice; and repugnant to the constitution.

Whenever a case is so nicely poised, as to render it doubtful which of the parties is legally entitled to the judgment of

IN ERROR.

ALBANY,
Feb. & March,
1811.

CATLIN
v.
JACKSON.

[*557]

IN ERROR.

ALBANY,
Feb. & March,
1811.

CATLIN
v.
JACKSON.

the court, considerations of hardship may be mingled, to aid in preponderating the scales of justice, on one side or the other: but where the law is clear, it must prevail, regardless of considerations of that kind. We sit not here to pass upon the personal merits of the parties in controversy, but upon their rights; nor is it imposed on the court to inquire what ulterior remedies are in the reach of either. They must be left to seek them, as they may be advised, under the certain assurance, that if there is a right, there is a legal remedy to enforce it. The imperious duty of this court, prescribed by the solemnity of the official oath of its members, is to decide according to law.

Every view, in which I have been able to place this subject, concludes to the affirmance of the judgment of the Supreme Court, and I am, therefore, for affirming it.

[*558] This being the unanimous opinion of the court, it was thereupon ORDERED and ADJUDGED, that the judgment *of the Supreme Court be affirmed; with double costs to be taxed, &c. and that the record be remitted to the said court.

Judgment affirmed.

IN ERROR.

ALBANY,
Feb. & March
1811.BRADSHAW
v.
CALLAGHAN.

WILLIAM BRADSHAW, JOHN BRADSHAW, jun. and
MARY BRADSHAW, who are impleaded with JOHN
BRADSHAW and NANCY CROTHERS, an infant, by
KENNETH GORDEN, her guardian, Plaintiffs in error,

against

PATRICK CALLAGHAN and ANN his wife, Defendants
in error.

THIS case came before this court, on a writ of error, from
the Supreme Court, on a judgment in *partition*.

From the record it appeared, that the defendants in error, presented their petition, under the act for the partition of lands, to the Supreme Court, in which they stated ; "that *James Bradshaw*, late of *Charlton*, in the county of *Saratoga*, and state of *New-York*, deceased, was before and at the time of his death, to wit, on the twentieth day of *April*, 1786, seised of an estate in fee of *and in a certain lot or parcel of land, situate, lying and being in the town of *Charlton*, in the county of *Saratoga* aforesaid, bounded on the north by the highway leading from *Charlton* to *Ballston*, on the east by the highway leading to *Schenectady*, on the south by a lot of ground of *Abraham Northrup*, and on the west by lots of ground of *Joseph Brown*, Esq. *Luoumus Hillers* and *John Holme*, jun. containing two hundred acres : and that the said *James Bradshaw*, on the twentieth day of *April*, 1786, died intestate, leaving a widow and issue, without having made any disposition, distribution or division of the said premises, and which said widow, as tenant in dower, is entitled to the one third part of the said premises, for the term of her natural life ; and that the petitioners, together with *William Bradshaw*, *James Bradshaw*, *John Bradshaw*, *John Bradshaw*, junior, *Mary Bradshaw* and *Nancy Crothers*, a daughter of

withstanding a particular estate is outstanding. And where a partition was made among several heirs, assigning to each his portion of lands, by metes and bounds, but excepting from each portion one third thereof, as the dower of the widow of the ancestor, it was held valid.

The statute relative to partition does not extend to a tenant in dower ; but the estate may, nevertheless, be divided among the other tenants, and a partition, so made, is good, though the dower of the widow is excepted and left undivided.

A widow's dower, not being within the purview of the act, her rights cannot be affected by the partition, nor is she liable for any part of the costs and expenses of making the partition. (b)

Where some of the defendants in the court do not join in bringing the writ of error, it seems that they ought to be summoned and severed. (c)

A judgment may be affirmed in part, and reversed in part. (d)

(a) In a proceeding for partition the petitioners must allege and prove that they are seised in common and show a present actual possession. *Clapp v. Bromaghian*, 9 Cowen, 530.

(b) *Acc. Coles v. Coles*, 15 Johns. Rep. 319. But when the husband was seised as joint tenant, or tenant in common of land, the widow, as her right of dower extends only to an undivided part, is a proper party to a partition among the several joint owners. *Id.*

(c) Any one defendant may bring error separately, but the record must be correctly described in the writ as to parties. *Clapp v. Bromaghian*, 9 Cowen, 364.

(d) *Vide Smith v. Jansen*, *supra*, 111.

In a petition for a *partition*, under the statute, it is not necessary to set forth the rights and titles of the several tenants, at large ; nor is it necessary to allege the sei-

[* 559]
sin of the ancestor or person from whom the parties derive title ; but it is sufficient to state, in general terms, that each tenant was seised of his part or share, in fee, or as the case may be, whether such seisin be acquired by descent or purchase. (a)

A tenant in common of the inheritance, may maintain partition, notwithstanding several heirs.

IN ERROR.

ALBANY,
Feb. & March,
1811.

BRADSHAW
v.
CALLAGHAN.

[* 530]

Mary Crothers, the wife of *James Crothers*, and who was one of the daughters of the said *James Bradshaw*, deceased, are seised of an estate in fee, as tenants in common, and owners of the premises herein before mentioned, in the respective proportions following, that is to say, the said *Ann*, the wife of the said *Patrick Callaghan*, and one of the daughters of the said *James Bradshaw*, deceased, in one equal undivided eighth part of the said premises, and the said *Patrick Callaghan*, as the purchaser of the share of *James Bradshaw*, junior, one of the sons of *Peter Bradshaw*, deceased, also one of the children of the said *James Bradshaw*, deceased, and of *Nancy*, widow of *James*, a daughter of the said *Peter Bradshaw*, deceased, and of *Sally Bradshaw*, also one of the daughters of the said *Peter Bradshaw*, deceased, and of *Margaret Fitzsimmonds*, wife of *Robert Fitzsimmonds*, also one of the daughters of the said *James Bradshaw*, deceased, and of *Jane Losie*, the wife of *Henry Losie*, one of the daughters of *George Bradshaw*, deceased, also one of the children of the said *James Bradshaw*, deceased, and of *Margaret Comstock*, the wife of *Stephen Comstock*, also a daughter of the said *George Bradshaw*, deceased, and of *George Bradshaw*, son of the said *George Bradshaw*, deceased, and of *Elizabeth Nichols*, wife of *Isaac Nichols*, also one of the daughters of the said *George Bradshaw*, deceased, of two undivided eighth parts, and two thirds of an eighth part of the said premises; and the said *James Bradshaw*, *John Bradshaw* and *Nancy Crothers*, respectively of an undivided eighth part thereof, and the said *William Bradshaw*, of one undivided eighth part thereof, and as the purchaser of the share of *James Bradshaw*, one of the sons of *George Bradshaw*, deceased, one of the children of the said *James Bradshaw*, deceased, also the undivided sixth part of an eighth part thereof; and the said *John Bradshaw*, junior, as the purchaser of the share of *Mary Wilson*, the wife of *Andrew Wilson*, one of the daughters of the said *George Bradshaw*, deceased, of an undivided sixth part of an eighth part thereof," &c.

On affidavit of due notice to the parties, a judgment by default was entered, and commissioners appointed to make partition pursuant to the directions of the statute. By the partition, each share of the parties, except *Mary Bradshaw*, the plaintiff, is set forth by metes and bounds, excepting and reversing out of each share, one equal third part thereof to be taken from a particular part of such share allotted, in severalty, as the dower of *Mary Bradshaw*.

No cause being shown against the partition, it was confirmed by the court, and the parties were adjudged to pay their respective proportions of the costs; and, among the rest,

Mary Bradshaw, the tenant in dower, was directed to pay *Patrick Callaghan* and his wife eighty dollars and ninety-six cents, being the proportion of the whole costs and charges, attending the partition, according to her right in the land, &c.

*The errors assigned were; 1. That the plaintiffs below have not set forth, in their petition, the rights and titles of all the tenants in common therein named

2. That it is not set forth in the said petition, that the several persons named therein, as the children and grandchildren of *James Bradshaw*, deceased, were, at the time of presenting the said petition, or of the several purchases therein mentioned, the only children and grandchildren of the said *James Bradshaw*, deceased.

3. That it is not set forth, in the said petition, that the several purchases therein mentioned were, at the time of presenting the said petition, consummated by legal conveyances, from the vendors to the purchasers.

4. That in setting off and allotting the shares of each of the several tenants in common, in the said petition, and in the record aforesaid named, one third part thereof was excepted, as and for the dower of *Mary Bradshaw*, the widow of the said *James Bradshaw*, deceased, which third parts so excepted, are yet undivided.

5. That the partition is not conformable to the judgment, or award of partition.

6. That although certain portions of the shares allotted to each of the tenants in common are excepted, as and for the dower of the said *Mary Bradshaw*, the widow of the said *James Bradshaw*, deceased, no specific share has been allotted or awarded to her, as her dower.

7. That judgment is notwithstanding rendered against the said *Mary Bradshaw*, for the full third part of the costs, charges and expenses of the said partition, and against the other plaintiffs, for their several proportions of the residue of the said costs, charges and expenses.

As the cause was argued in the absence of the reporter, the arguments of the counsel are, necessarily, omitted.

THE CHANCELLOR. The writ of error, in this cause, *has brought up from the Supreme Court a judgment in *partition*.

As to the *first* error assigned. At common law, coparceners only could have writ of partition. They were held to be in the estate, on the seisin of their ancestor, and all the *coparceners*, collectively, constitute one heir. (*Co. Litt. 131.*) Hence it was deemed essential to set forth the seisin of their ancestor, under which they derived their right, as well to entitle them to the writ, as to show their respective proportions.

IN ERROR.

ALBANY,
Feb. & March,
1811.

BRADSHAW
v.
CALLAGHAN

[* 561]

[* 562]

IN ERROR.

ALBANY,
Feb. & March,
1811.

BRADSHAW
v.
CALLAGHAN.

The statute of 31 Hen. VIII. c. 1, extended the remedy to tenants in common and joint tenants, and in that statute, *rights*, *title*, and *interest* are used as *synonyms*.

Our statute directs, that the party applying for partition, shall set forth the *rights* and *titles* of all the parties; and this, it has been contended, imposes it on the party applying for partition, to set forth the right and title *at large*, of all the parties to the suit.

This statute must receive its construction from the terms in which it is conceived, expounded by the ordinary use to which those terms, in legal phraseology, are applied. If that application has been uniform and durable, it will certainly aid in ascertaining the intent of the statute.

In an action for an *annuity*, it is not necessary to set forth the title and estate of the grantor, but only that he did grant it. (*Heath's System of Pleading*, 5. Co. *Litt.* tit. *Annuity*, 49.) In *replevin*, a defendant may *avow*, as tenant to *I. S. who was seised*. (*Noy*, 70.) A *feoffee* may plead that *A. was seised* and did enfeoff him. (*Heath's System of Pleading*, 80. 18 *Edw.* IV. 1. 26.) In *ejectment*, *seisin* and a descent cast are, *prima facie*, evidence of right. In an action for a *rent-charge*, the form of deducing the defendant's *privity* is, that the premises on which the rent was reserved, came to his hands by *assignment*, without showing how; and in *ejectment*, the proof that the defendant *holds* under the same title with the lessor, entitles him to commence his deduction from the common source.

When *partition* could only be had by *coparceners*, they were *conusant* of each other's right; and thus *privity* attached with, and constituted, an essential part of their estate. It is not so with tenants in common. They have a unity of interest, but may be in by totally different titles. All that the petitioners were bound to maintain, as to the defendants, was, that they held with them, as tenants in common, the proportion of the estate described in their petition.

In analogous cases, it does not require that the title should be spread on the record. The words of the statute may as well be satisfied, by alleging the *seisin* of all the parties, of their different portions simply, which constitutes their title, as if it were traced from the state or the crown. It would be surcharging the record with useless matter, and impose on the plaintiff in partition, in all cases, a hazardous, and, in many cases, an impracticable task, to compel him to set forth his title beyond his own *seisin*, as he must do it correctly, or fail in sustaining his action. The general allegation of *seisin*, I therefore think, was well enough.

As to the second error assigned. If my reasoning on the first point is correct, it concludes to this; for if the allegation

that *James Bradshaw*, the ancestor, was seised, was not essential to the maintenance of the action, then it is surplusage, and may be rejected as such, and of course, cannot vitiate. The partition may be maintained on the seisin of the parties generally; and that is alleged with sufficient certainty.

So as to the third point, as to purchasers; for whether acquired by descent or purchase, is perfectly immaterial, if the seisin entitles the party to maintain a writ of partition.

As to the fourth and sixth errors assigned, it is apparent from the record, that the dower of the widow was left in *status quo*. That she is not included in the *description of joint tenant, tenant in common or coparcener, to which classes only the statute extends is certain. She is of consequence not affected by the partition. She holds by title paramount, and the partition was confined to the inheritance only; and so was the opinion of the Supreme Court, (5 *Johns. Rep.* 80,) that the partition was no bar to her recovery. The dower, therefore, affected every part of the land equally. So in *England*, the word *tenet*, in a writ, always implies tenant of the freehold; and if one be disseised by another, no writ of partition lies. (*Vin. Abr.* tit. *Partition*, (S.) pl. 2.) So when *dower* was brought against several purchasers, the court directed them to be charged proportionally; (*Freeman*, 227. pl. 234;) for, in equity, they must be equally charged, and a writ of dower will lie against a tenant in common, before partition made. (3 *Lev.* 84.)

It appears to me, from these authorities, and the general doctrine respecting partition, that a tenant in common of the inheritance may maintain partition, notwithstanding a particular estate is still outstanding. The actual assignment of dower might have required a different modification among the parties to the partition, had the assignment preceded it. But here it must have been subsequent, and when the partition was made, it was uncertain whether it would ever be demanded. If it was, it might be a question, whether all the parties holding under such partition could be included in one *præcipe*. If they could not, each must respond only for the portion he held. If they could, and the assignment affected their interests, unequally, they had a remedy in chancery.

The fifth point went to the exclusion of *Mary Bradshaw's* share; the omission of which, it was alleged, was not conformable to the judgment or award of partition. The judgment and award are, however, complete, as to the parties who held the inheritance, and severs their *rights, subject to the dower, and within the foregoing reasoning.

As to the seventh error; the judgment against *Mary Bradshaw*, for the one third of the costs, is clearly erroneous; for as her rights were not affected by it, she could not be subject

IN ERROR.

ALBANY,
Feb. & March,
1811.BRADSHAW
v.
CALLAGHAN.

[* 564]

[* 565]

IN ERROR.

ALBANY,
Feb. & March,
1811.

BRADSHAW
v.
CALLAGHAN.

to costs ; and it may well be doubted whether she was a necessary party at all. It has been attempted to be shown, by affidavit, read without notice to the opposite party, that she has died during the pendency of this suit in error. In *England*, the death of a tenant does not abate a suit in partition. Here, it may be otherwise ; but the fact has not been regularly brought up, and it cannot be necessary to examine it. This, however, only affects a part of the judgment ; and this court are required not only to reverse an erroneous judgment, but to render such a judgment as the court below ought to have done. In this case, if the judgment with respect to *Mary Bradshaw* should be deemed erroneous, and if this affected the whole judgment, so as legally to impose it on the court to reverse it, or so to modify it, *in toto*, as to render a judgment according to the rights and justice of the case, it must affect all the parties to the suit below, all of whom are not here ; for, to render complete justice, the judgment of the court ought to exempt the widow from the payment of the costs adjudged against her ; and to apportion it among the other parties in proportion to their several interests. But *James Bradshaw* and *John Bradshaw* were also defendants in the court below, who, it seems to me, as they have not joined, ought to have been summoned and severed ; for if that is not the rule, the plaintiff in the court below, though the judgment should be affirmed, might be harassed and delayed by several successive writs of error. (2 *Bac. Abr.* 461.) But so far as respects the costs adjudged against *Mary Bradshaw*, she and the defendants are the only persons interested ; for the judgment is, "that the said *Mary Bradshaw* pay to the said *Patrick Callaghan* and **Ann* his wife, eighty dollars and ninety-six cents, being the proportion of the whole costs and charges attending the partition aforesaid, according to her right in the lands and tenements aforesaid."

[* 566]

That a judgment may be reversed in part, and affirmed in part, where different matters of the judgment are distinguished, is clear. (4 *Burr. 2021.* 1 *Str. 188.* 2 *Str. 934.* 1 *Salk. 312.*) Here there is a distinct judgment ; and I am, accordingly, of opinion, that the judgment, as to the costs, adjudged against *Mary Bradshaw*, be reversed, and that the plaintiffs, as to the residue, go without day.

This being the unanimous opinion of the court, it was thereupon ORDERED and ADJUDGED, that the judgment of the Supreme Court be reversed, so far forth as respects the costs thereby adjudged to be paid by *Mary Bradshaw*, to the said *Patrick Callaghan* and *Ann* his wife, and that as to the residue of such judgment, that the plaintiffs go thereof without day ; and that the record be remitted, &c.

IN ERROR.ALBANY,
Feb. & March,
1811.WATERS
v.
TRAVIS.THOMAS WATERS, *Appellant,*
against
EZEKIEL TRAVIS, *Respondent.*

FEBRUARY 26, 1831. *Riggs*, counsel for the *appellant*, stated that the cause had been set down for hearing on this day, and that the *respondent* had not answered the petition of appeal, pursuant to the rule entered for that purpose, according to the practice of the court; *and that as the *respondent* did not appear in person, or by counsel, to argue the cause, he prayed that the cause might now be heard *ex parte*.

The Court. We do not hear arguments *ex parte*; and the *appellant* must take a judgment by default.

On motion of Mr. *Riggs*, it was thereupon ordered, adjudged and decreed, that the decree of the Court of Chancery be reversed; and that the bill of complaint of the said *Ezekiel Travis*, in the Court of Chancery, be dismissed; and that he pay to the *appellant* the costs in the Court of Chancery to be taxed, and that the record be remitted, &c.

March 4. The petition and affidavit of the *respondent* were read, stating that he was poor, and unable to procure counsel to attend at *Albany*, to argue the cause in his behalf, &c.; that no rule or order of this court had been served upon him, and that he had received no notice of the proceedings on the part of the *appellant*.

The Court, thereupon, ordered, that the decree which had been entered by default, should be reconsidered; and that all further proceedings on the part of the *appellant* should be stayed, until the further order of the court. Counsel were also assigned for the *respondent*.

March 18. *J. Duer*, for the *respondent*, moved to set aside the judgment by default, entered in this cause, on the ground of irregularity. He said it was, as he understood, the practice of the House of Lords, in *England*, to hear arguments *ex parte*, and not to give judgment, of course, by default; but there were other reasons why this court should not allow of such judgments; for the constitution and rules of this court require the chancellor, in every case of appeal, and *the judges of the Supreme Court, in every case on writ of error, to assign the reasons of their judgment. This court, then, cannot re-

A copy of the rule to answer the petition of appeal, or to join in error, or notice thereof, must be served on the solicitor of the *respondent*, or on the attorney for the defendant in error; and, in case no solicitor or attorney be employed, the service of the rule or notice must be on the *respondent*, or defendant in error, personally.

Where a decree of reversal had been entered by default, without service of a copy, or notice of the rule to answer the petition of appeal, the decree was set aside for irregularity; although the decree had been entered up, and the record remitted.

Whether this court will hear arguments *ex parte*, or enter a decree by default, as of course, *quare*.

Where a *respondent* presented a petition to the court, stating that he was poor, and unable to employ counsel, the court assigned him counsel.

IN ERROR.

ALBANY,
Feb. & March,
1811.

WATERS
v.
TRAVIS.

verse the judgments or decrees of those courts, without hearing the reasons on which they were founded. And it might have been, that in this case, had this court heard the chancellor's reasons, they would have affirmed the judgment, even on the *ex parte* argument of the *appellant*; and he insisted on the unreasonableness and injustice of the practice of giving judgment by default, as of course, in this court. It appeared, also, by one of the printed rules of the court, that where a defendant in error, or *respondent*, has not appeared by attorney, or solicitor, that all rules and notices must be served on him in person.

Riggs, contra, said, that the decree of reversal, which had been taken by default, in this cause, had been entered up, and the *remittitur* taken out of the court, before the order was entered to stay further proceedings; and he submitted whether this court, possessing only an *appellate* jurisdiction, could now have any further power over the cause, when the record had been sent back to the Court of Chancery. In the case of *Dean v. Secord*, in 1800, this court decided, that after *remittitur* was taken out of court, it was too late to correct any error, even in its own judgment; as the cause was then out of the power of the court. He read an affidavit, stating that he served a copy of the petition of appeal on the *respondent's* solicitor and counsel, in *New-York*, to whom he gave notice of the exhibition of the petition of this court; and was informed by the counsel, that he should not attend this court during this session; but could not learn, from inquiry, that the *respondent* had employed any one to appear for him in this court.

He said, that according to the practice of the court, as he had understood it, from the decision in the case of *Nevin v. Belknap*, and other causes, a copy or notice of *the rule to answer the petition of appeal, or to join in error, need not be served. The rule of court which had been cited, provided only for the case in which a service of a rule or order was requisite; but in the present case, the service was not necessary; and it was not the practice to employ an attorney or solicitor in this court.

[*569]

March 19. *Per Curiam.* Ordered, that the decree, in this cause, be set aside for irregularity.

END OF THE CASES IN ERROR.

INDEX

TO THE

PRINCIPAL MATTERS

IN THE EIGHTH VOLUME.

A

ABATEMENT.

See PLEADING, 9. TENANTS IN COMMON.

ACTS OF THE LEGISLATURE.

Where a person purchased land, at a sheriff's sale, in 1774, and a deed was delivered to a third person, to be delivered to the grantee, on payment of the purchase-money, and the purchaser did not pay the money, but was afterwards attainted, in 1779, it was held that the state could not, by paying the money, perform the condition, so as to devest the estate of the original debtor or his heirs; and that a *private* act of the legislature, passed on the petition of the judgment creditor, directing the land to be sold, and the money to be paid to the creditor, did not take away the

right or interest of the debtor, or of his heirs, or affect any person not a party to the act. *Carlil v. Jackson ex dem. Gratz and others* in error, 520

See STATUTES.

ACT TO ENCOURAGE THE MANUFACTURING OF WOOLLEN CLOTH, WITHIN THIS STATE. (Sess. 31, c. 186.)

1. *A.* and *B.* submitted pieces of cloth, of their own manufacture, respectively, to the judges of the county, in order to obtain the bounty given by the act of the legislature, (sess. 31, c. 186, s. 2,) and at the time of the submission, *A.* promised that if the cloth presented by him obtained the bounty, he would pay the one half of the bounty to *B.* deducting the expense of procuring it, on condition that *B* was entitled to present his cloth, it

I N D E X.

having been fulled and dressed out of the county, but in all other respects manufactured within it, in the family of *B.*; and *B.* made a similar promise to *A.* to pay him one half of the bounty in case *A.* should obtain it, but without any condition. The bounty was adjudged to *A.*, and *B.* brought an action of *assumpsit* against him, to recover the half. It was held, that the contract being made after the manufacture was complete, it was not against the policy of the act, as it could then have no influence on the competition between the parties. To entitle a party to present cloth, in order to obtain the bounty given by the second section of the act, it is not requisite that it should be *fullled* and *dressed* in the same county in which it was manufactured: but it is sufficient, if it was *manufactured* in the *family* of the party within the county. *Briggs v. Tillotson,*

304

ACTION.

1. To maintain an action, as for a *deceit* on a *parol* representation as to the credit and responsibility of a third person, the plaintiff must prove actual fraud in the defendant, or an intention in the defendant to deceive him by false representations. *Deceit* is the *gist* of the action; and though the advice given be rash and indiscreet, yet if there is no ground to infer an intent to deceive, it will not support the action. *Young and Otis v. Covil,*

23

436

2. If *A.* sets fire to his own fallow ground, as he may lawfully do, which communicates to, and fires the woodland of *B.* his neighbor, no action lies against *A.* unless there was some negligence or misconduct in him or his servants. *Clark v. Foot,* 421

See FOREIGN JUDGMENT, 1. JUSTICE'S COURT, 18.

ACTION FOR MONEY PAID, &c.

1. The mere giving a bond for the debt of another, is no payment; and an action for *money* paid, laid out and expended, for the use of the defendant, will not lie, unless the plaintiff has actually advanced *money*. *Cumming and Cumming v. Hackley and Fisher,* 202

ACTION QUI TAM.

1. In an action *qui tam*, on the 6th section of the act concerning slaves, (sess. 24, c. 188,) it was held, that the *exception* in the clause was matter of excuse to the defendant, and need not be negatived by the plaintiff, in his declaration. *Hart, qui tam, v. Cleis,* 41

2. In an action by a *common informer*, on the 2d section of the *act to prevent usury*, (sess. 10, c. 13,) the plaintiff must declare specially, and state the usury, &c. The general form of declaring mentioned in the act, is given only to the *borrower* *Morrell, qui tam, v. Fuller,* 218

I N D E X.

APPRENTICE.

1. An infant cannot be bound an apprentice, unless he is a party to, and executes, the deed or indenture. Where the father of an infant and the master executed an indenture, binding the infant to the master, it was held that the indenture (though the father was bound,) was not binding on the child; and that the infant alone could take advantage of any defect in the indenture. *In the matter of the M'Dowles*, 328

ARREST.

1. A judge is not liable to arrest by process issuing out of his own court, but must be proceeded against by *bill*. Whether after bail is put in, the arrest and proceedings may be set aside on motion for irregularity, must depend on the practice of the court. This court will not interfere with the proceedings of an inferior court in this respect. *In the matter of W. Livingston*, 351

2. The mere delivery of a *ca. sa.* to a sheriff, is not, *ipso facto, et eo instanti*, an *arrest*, so as to place the defendant in custody on the execution, and render the sheriff liable for an escape. *Tracy and another v. Whipple*, 379

ASSUMPSIT.

1. Where *A.* applied to *B.* for goods on credit, and *B.* refused to let him have them without security, on which *A.*

drew a promissory note for the amount, under which *C.* wrote, "I guaranty the above;" and the goods were thereupon delivered, this was held to be a *collateral* undertaking of *C.* but that there was no necessity for any distinct consideration passing directly between *B.* and *C.*, for being all one entire transaction, the delivery of the goods to *A.* supported the promise of *C.* as well as the promise of *A.* and that the words *value received*, in the note were sufficient evidence of a consideration, on the face of the writing; but if any doubt existed, *parol* evidence was admissible, to show the consideration, or that it was one original and entire transaction. *Leonard v. Vredenburgh*, 29

2. *A.* an overseer of the poor, had the management and control of the property of *B.* a *pauper*, and received moneys belonging to her, in consideration of which he promised *C.* to pay him a debt due to him from *B.* This was held a valid undertaking, it being an express promise in writing, and founded on a valuable consideration. *Holly v. Rathbone*, 148

3. In an action of *assumpsit*, brought by *A.* against *B.* the defendant may set off a *bond* given by *A.* to *C.* and *assigned* by *C.* to *B.* before the commencement of the suit. *Tuttle v. Bebee*, 152

4. *A.* gave a promissory note to *B.* payable in sixty days, and in consideration that *C.* at the request of *A.*

I N D E X.

would also sign the note as surety, *A.* undertook and promised to take up the note when it became due, and to indemnify *C.* and save him *harmless* from all damages and costs which he might sustain by reason of his signing the note, &c. and *A.* did not take up the note, &c.; but *C.* was sued by *B.* who recovered judgment against him, on which *C.* was taken in execution and committed to prison. In an action of *assumpsit* brought by *C.* against *A.* the latter pleaded that *C.* was discharged from his imprisonment under the execution, by virtue of the act for the relief of debtors, &c. and had never paid the note, or the judgment against him, or any part thereof, &c. On *demurrer*, the plea was held bad, and that the plaintiff was entitled to recover on the promise to indemnify. *Powell v. Smith,* 249

5. *A.* and *B.* submitted pieces of cloth, of their own manufacture, respectively, to the judges of the county, in order to obtain the bounty given by the act of the legislature; (sess. 31. a. 186. s. 2;) and at the time of the submission, *A.* promised, that if the cloth presented by him, obtained the bounty, he would pay one half of the bounty to *B.* deducting the expense of procuring it, on condition that *B.* was entitled to present his cloth, it having been fulled and dressed out of the county, but in all other respects manufactured within it, in the family of *B.*, and *B.* made a similar promise to *A.* to pay him one half of the bounty in case *A.* should obtain

it, but without any condition. The bounty was adjudged to *A.*, and *B* brought an action of *assumpsit* against him, to recover the half. It was held that the promise of *B.* to *A.* was held a sufficient consideration for the promise of *A.* to *B.* *Briggs v. Tillotson,* 304

6. Where *A.* promised to pay a debt barred by the statute of limitations, in certain specific articles, it was held, that the promise was conditional, and that the plaintiff was bound to show that he offered, and was ready to receive the specific articles. *Bush v. Barnard,* 407

ATTAINERDE AND CONFISCATION.

1. By the act of attainder and confiscation, of the 22d *October*, 1779, a mere condition did not become forfeited so as to vest in the people of the state the right to perform it *Catlin v. Jackson, ex dem. Gratz and others,* in error, 520

2. Where a person purchased land at a sheriff's sale, in 1774, and a deed was delivered to a third person, to be delivered to the grantee, on payment of the purchase-money, and the purchaser did not pay the money, but was, afterwards, attainted, and his estate confiscated in 1779, it was held, that the state could not, in 1788, by paying the money, perform the condition, or devest the estate which remained in the original debtor or his heirs, *ib.*

INDEX.

ATTORNEY.

1. *A* having purchased a lot of land of *B*, the title of which was doubtful, released and reconveyed to *B*, his right and title to the lot; and at the request of *B*, consented that *B* might use the name of *A*, in an action of ejectment to recover the land, but *A* was not to be at any further expense, or have any thing to do with the suits or costs in question, except as to the using his name, if necessary. *B* employed *C*, an attorney, to bring the action of ejectment, and told *C* that *A* had consented to let his name be used, and *C* accordingly used the name of *A*, as one of the lessors. The plaintiff in the suits was nonsuited; in consequence of which, *A*, as one of the lessors, was obliged to pay the costs. *A* brought an action on the case against *C*, the attorney, for using his name without his consent, so as to subject him to the payment of costs, &c.; it was held, that the authority given by *A* to *B*, being conditional and limited, *C* followed the directions of *B*, at his peril, and had no right to use the name of *A*, so as to subject him to any costs or expenses; and that *A* was entitled to recover of *C*, the amount of the costs which he had been compelled to pay. *Bradt v. Walton and Vanhorne*, 298 defendant's attorney, of any claim or *lien*, and without any collusion, to deprive the attorney of his costs. The claims which an attorney may have on his client for extra services, or for counsel fees, make no part of the attorney's *lien* upon the taxed costs, or which the court will protect against the interference of his client. *The People v. Hardenbergh*, 335

3. In a suit against an *attorney* of this court, the *bill* is in the nature of process, and must be served upon him *personally*, or some other service which the court, under circumstances, may consider equivalent. Service on the agent of the attorney is not sufficient. *Backus v. Rogers*, 346

4. Where a writ of error is brought to this court, on a judgment obtained in a court of common pleas, and the judgment below is affirmed; the *attorney* of the plaintiff in error is not bound to pay the costs in error, on the ground, that before the judgment was obtained in the court below, the plaintiff had removed out of the state, and his attorney had not filed any security for the costs. The bringing of a writ of error is not the commencement of such a suit as would render the attorney responsible for the costs; nor does the case come within the meaning of the 14th rule of *January term, 1799*, as to filing security for costs. *Frary v. Dakin*, 353

5. The plaintiff's attorney, from his gen- 439

I. N. D. E. X.

eral character as attorney, has no authority to discharge the defendant from execution on a *ca. sa.* until the money is paid. His general authority ceases with the judgment, or at least with the issuing of an execution within the year. *Jackson ex dem. M'Crea v. Bartlett,* 361

signment of the bail-bond; but the proper course is to except to the sufficiency of the bail. *Caines v. Hunt,* 358

2. A defendant has twenty days after the last day of the second week of the term, within which to put in special bail. *Lane v. Cook,* 359

See SLANDER, 1. COSTS, 1.

AUCTION.

Where the contract or job for making a road, was put up for sale at auction, and *A.* and *B.* agreed that one of them should bid, and if the contract should be struck off to the one bidding, the other should have an equal share in it, and it was struck off to *B.*, against whom *A.* afterwards brought an action for a breach of the agreement between them; it was held, that the agreement was without consideration, and void. *Wilbur v. How,* 444

BAKER AND FLODDER'S PATENT.

The patent to *Baker and Flodder*, in 1667, is not void, for uncertainty *Frier and Cooper v. Jackson, ex dem. Van Aken*, in error, 495

BILL OF EXCEPTIONS.

A bill of exceptions does not draw the whole matter into examination, but only the points to which it is taken; and the party must lay his finger on the points which arise, either in admitting or refusing evidence or matter of law, arising from a fact not denied, in which he is overruled by the court. *Frier and Cooper v. Jackson, ex dem. Van Aken*, in error, *ib.*

B

BAIL.

1. The plaintiff is entitled to two real and substantial persons, as special bail; but if one real and one fictitious person be put in, as special bail, the plaintiff cannot treat the bail-piece as a nullity, and take an as-
440

BILL OF LADING.

See MASTER OF SHIP.

BLASPHEMY.

1. *Blasphemy* against God, and contumelious reproaches, and profane ridicule of Christ, or the *Holy Script-*

I N D E X.

tires, are offences punishable at the common law, whether uttered by words or in writings. *The People v. Ruggles*, 290

2 Wantonly, wickedly and maliciously uttering the following words, "Jesus Christ was a bastard, and his mother must be a whore," was held to be a public offence, and punishable by the common law of this state, *ib.*

BOND.

Separate suits were brought against *A.* and *B.*, two joint obligors on a bond, payable by instalments, and a *ca. sa.* was afterwards issued against *B.* for the costs taxed in the suit against him, and not for the instalment from which he was discharged after paying the costs. It was held that the discharge of *B.* from the *ca. sa.* for the costs was no discharge of *A.* the obligor, nor a satisfaction of the debt for which *A.* was imprisoned. *M. Lean v. Whiting*, 339

possession, and declared he had bought it for him, and afterwards died in 1789, leaving several children, his heirs at law, and *B.* continued in possession of the land above twenty-seven years, but without having obtained a deed from his father; it was held, that *B.* was in possession under his father, and not in his own right, or adversely to his father, and that the act of 1791 confirmed the right to the land in the heirs of *A.* generally, on whom the law cast the inheritance; and that the rest of the children of *A.* were entitled to their proportion of the land so occupied by *B.* *Jackson, ex dem. Bromley and others, v. Benjamin*, 101

CHAMPERTY.

See MAINTENANCE.

CHURCH, TRUSTEES OF.

Trustees of a church, *qua* trustees, can have only a constructive possession, by reason of having the right of possession. *The People v. Runkle*, 464

C

CANAAN ACT.

The act of 22d March, 1791, (sess. 14. c. 42. s. 11,) sometimes called the *Canaan Act*, granted the lands only to those who were in possession, in their own right, and not occupying in the right of another. Where *A.* bought land in *Canaan* in 1782, and put *B.*, one of his sons, in immediate *Vol. VIII.* 56

COMMON PLEAS.

Where it appeared from the face of the plaintiff's declaration in the Court of Common Pleas, that the demand was certain, so that he could not, in any event recover two hundred fifty dollars, though the damages demanded in the conclusion of the declaration were three hundred dollars, and the court proceeded in the cause, *not* 441

I N D E X.

withstanding the defendant had filed, in open court, a *habeas corpus*, to remove the cause, which had been duly allowed; this court refused to grant an attachment against the judges of the Court of Common Pleas, for not obeying the writ. But where the demand appears to be uncertain, so that the plaintiff might recover above two hundred fifty dollars, the writ must be obeyed and returned. *Shotwell v. Daniels*, 341

in a collateral action. *Wood v. Peake*, 69

CONTRACT.

1. The *time* of payment is part of the original contract, and if no time of payment is expressed in a note, the law adjudges it to be payable immediately; and *parol* evidence is inadmissible to show a different time of payment. *Thompson v. Ketcham*,

189

2. A contract must be proved as laid in the plaintiff's declaration. He cannot give in evidence an *entire* contract relating to two distinct subjects, when he declares only as to one of them. *Crawford v. Morrell*, 253

3. Where the plaintiff declared on a contract, by which the defendant agreed to pay him a certain sum, for half the land taken for a certain road; and the contract proved at the trial, was, that the defendant was to pay for *all* the land, the variance was held fatal, *ib.*

4. If part of one entire contract be illegal and void, the whole is void, *ib.*

See FRAUD, 2.

CO-OBIGORS.

See BOND.

CORPORATION.

1. Where a corporation sues, either on

I N D E X.

a contract, or to recover real property, it must, at the trial, show that it is a corporation, or be nonsuited. *Jackson, ex dem. The Trustees of the Union Academy of Stone Arabia, &c. v. Plumbe,* 378

2. A regular corporation aggregate cannot be seized of land, in *trust*, for purposes foreign to its institution. *Jackson, ex dem. Lynch, v. Hartwell,* 422

3. The supervisors of a county are a corporation, with special powers, and for special purposes only; and it is very questionable whether, prior to the act passed 8th April, 1801, (sess. 24. c. 180,) they were competent to take a grant of land. *Jackson, ex dem. Lynch, v. Hartwell,* ib.

COSTS.

1. Where an attorney in this court was sued in November, 1809, for twenty-five dollars and ninety-three cents, and had a set-off of twenty dollars and twenty-five cents, and the plaintiff recovered five dollars and sixty-eight cents, it was held, that the defendant was entitled to recover costs; but that the plaintiff might set off the amount he had recovered against so much of the costs, *Willet v. Starr,* 123

2. Where an inquisition, taken under the 20th section of the act relative to highways, (sess. 24. c. 186,) for an encroachment on the highway, was removed into this court by *certiorari*, and quashed, it was held, that the appellant was not entitled to costs. It is a *casus omissus* in the statute as to costs. *Low v. Rogers,* 321

3. A settlement of the costs by the defendant in a suit, in whose favor they are awarded, with the plaintiff, is valid, if made without any notice from the defendant's attorney of any claim or lien, and without any collusion to deprive the attorney of his costs. The claims which an attorney may have on his client for extra services, as for counsel fees, make no part of the attorney's *lien* upon the taxed costs, or which the court will protect against the interference of his client. *The People v. Hardenbergh,* 335

4. Where separate suits are brought against the *maker* and *endorser* of a note, and separate judgments recovered, the plaintiff is entitled to the costs in each suit. The statute (sess. 24. c. 90. s. 14,) does not apply to this case. *Austin v. Bemis,* 356

5. Where the plaintiff in an action of *trespass quare clausum fregit*, &c. recovered less than fifty dollars damages; and the defendant recovered costs, the defendant's taxed costs were allowed to be set off against the damages recovered by the plaintiff who was *insolvent*. The *lien* of the plaintiff for his costs in this case extends only to the balance due, after deducting the defendant's charges, and does not affect the equitable right 443

I N D E X.

of *set-off* between the parties. *Porter v. Lane*, 357

6. In an action, by an *administrator* on a note given to the intestate, for ninety dollars, the jury found a verdict for the plaintiff for fifteen dollars; and it was held that the plaintiff could not recover costs, nor was he obliged to pay costs. *Cartile v. Bates*, 379

See ATTORNEY, 4. *PLEADINGS*, 7.

COURT.

See COMMON PLEAS.

COURT OF ERRORS.

1. A copy of the rule to answer the petition of appeal, or to join in error, or notice thereof, must be served on the *solicitor* of the *respondent*, or on the *attorney* for the defendant in error; and in case no solicitor or attorney be employed, the service of the rule, or notice must be on the *respondent*, or defendant in error, personally. *Waters v. Travis*, 566

2. Where a decree of reversal had been entered, by default, without service of a copy, or notice of the rule to answer the petition of appeal, the decree was set aside for irregularity; although the decree had been entered up, and the record remitted, *ib.*

3. Whether this court will hear argument *ex parte*, or enter a decree by default, as of course, *quare*, *ib.*

4. Where a *respondent* presented a petition to the court, stating that he was poor, and unable to employ counsel, the court assigned him counsel, *ib.*

COUNTY.

See SUPERVISORS.

COVENANT.

1. Where *A.* and *B.* gave a sealed note to *C.*, and *A.* afterwards gave a bond and mortgage to *C.* for the amount due on the note, and *C.* covenanted to procure and cancel the note; it was held that, though the bond and mortgage were not an *extinguishment* of the note, yet the covenant made with *A.* was for the benefit of *A.* and *B.*, and a covenant not to sue, which amounted to a release of the note. *Phelps v. Johnson*, 54

2. *A.* having sold and conveyed to *B.* a certain piece of land, covenanted with him to indemnify and save him harmless from all demands, dues and damages whatsoever, which might happen or arise to him, from a certain mortgage on the same land: it was held that this was tantamount to a covenant for quiet enjoyment against the mortgage; and that *B.* could not maintain an action for a breach of the covenant, without showing an eviction under the mortgage. *Van Slyck v. Kimball*, 198

3. *A.* covenanted, on the 30th *March*,

I N D E X.

1799, to convey to *B.* by a good warranty deed, at the reasonable request of *B.*, a certain lot of land; and "for which *B.* covenanted to pay *A.* a certain sum of money, one half in three, and the other half in six years." The lot was under a mortgage, dated in *January*, 1799, and which was registered at the time the contract was made: which mortgage was not discharged of record until *August*, 1809, but the certificate of discharge had been given in *February*, 1808. In 1803 or 1804, *B.* had demanded a deed of *A.* which he refused, saying it was not in his power to give a deed, as the lot was under mortgage. In *November*, 1808, *A.* tendered to *B.* a deed with all the usual covenants and warranty, which *B.* refused to accept; and in an action of covenant brought by *A.* against *B.* for the money agreed to be paid, it was held, that the refusal of *A.* to convey, on the ground of his inability to give a good title, was a default of which *B.* might avail himself as a defence against the action; that after such refusal, *B.* was not bound to tender the money, nor to accept the deed afterwards tendered to him. *Van Benthuysen v. Crapser*, 257

after the time, by the consent and agreement of the defendant, did not support the declaration. *Philips and another v. Rose*, 392

D

DAMAGES.

See TRESPASS, 2.

DE BRUYN'S PATENT.

The true construction of *De Bruyn's Patent* is a line from *David's Hook* to the *Saw-kill*, drawn between those two points, along the east shore of *Hudson's river*, to compose the *wester*n boundary; a line along the west bank of the *Fish Lake*, in its whole extent, the *eastern* boundary; and straight lines from the extremities of the *Fish Lake* to the stations on the *Hudson* or *David's Hook* and the *Saw-kill*, the *northern* and *southern* boundaries. *Frier and Cooper v. Jackson, ex dem. Van Alen*, in error,

495

DECEIT.

To maintain an action, as for a *deceit*, on a parol representation as to the credit and responsibility of a third person, the plaintiff must prove actual fraud in the defendant, or an intention to deceive him, by false representations. *Deceit* is the *gist* of the action; and though the advice

445

4. Where the plaintiff covenanted to build a mill in a certain place, and by a certain time, and in an action of covenant, averred, that he erected the mill at the place, and by the time mentioned in the agreement; it was held, that parol evidence that the mill was erected at a different place

INDEX.

given be rash and indiscreet, yet if there is no ground to infer an intent to deceive, it will not support the action. *Young & Otis v. Covell*, 23

DEED.

In 1790 a patent was granted for a military lot to *A.* who had been a soldier in the army of the *United States*; and who in *February*, 1795, sold and conveyed it to *B.* *C.* in 1793, purchased the same lot of a person pretending to be the original patentee, and who fraudulently executed a deed for the lot to *C.*, who afterwards conveyed it to *D.*, who sold it to various persons who took possession under him. In *August*, 1804, *A.*, the real patentee, executed another deed for the same lot to *W.*, which was first recorded; and in 1806, *D.* purchased the title of *W.* and took a deed from him, which was also recorded. In an action of ejectment brought by *B.* against the persons in possession under *D.*, it was held, that when *W.* purchased of *A.*, in 1804, the land was held adversely under a void title; but as *D.* afterwards purchased the title of *W.*; derived from the real patentee, for the benefit of those in possession, *B.* could not set up that *adverse* possession to defeat the purchase by *W.*; and that the persons holding under *D.* had a right to protect themselves by the title of *W.* equally as if they had purchased it of *W.* *Jackson, ex dem. Humphrey and others, v. Given and others*, 137

2. The deed from the patentee to *W* being first recorded, was entitled to a preference, under the statute, 'there being no satisfactory proof of an actual or implied notice to *W.* of the prior deed to *B.*' *ib.*
3. To defeat the prior registry of the second deed, there must be fraud or undoubted notice, *ib.*
4. If one affected with notice conveys to another without notice, the latter is as much protected as if no notice had ever existed, *ib.*
5. Where *A.* a tenant in possession, by writing, under his seal, surrendered the possession and premises to the lessor in an action of ejectment, and all right, &c. to have and to hold to the lessor, his heirs and assigns for ever, *provided* such lease should be accepted by the lessor, as a full discharge for all lands claimed of *A.* by the lessors under the ejectment, &c. It was held, that, admitting the full discharge of all claims mentioned in the proviso, to amount to a sufficient consideration, and that the deed contained words sufficient to pass a fee, yet it was void, and no bar to *A.*'s title, unless the lessors showed a valid discharge, which could not be by parol, or by mere implication, arising from the fact of possession of the deed. *Jackson, ex dem. Bain & Van Slyck, v. Pulver*, 370
6. *A.* on the 19th December, 1793, gave a lease to *B.* of a part of a lot of land for sixty years; and on the 26th of

I N D E X.

December, 1793, executed a deed in fee for part also of the same lot. C. took immediate possession, under his deed, and continued in possession near sixteen years; B. afterwards claimed part of the premises in the possession of C., as comprised in the lease to B. It was held, that the deed to C. was valid, notwithstanding the lease, and that B. could not set up any new location, so as to invalidate the possession of C. *Jackson, ex dem. Butler and others, v. Gardner,* 394

7. Every exception and uncertainty in a deed is to be taken favorably to the grantee, *ib.*

See EVIDENCE, 5. POSSESSION, 2.
SHERIFF, 12, 13.

DEVISE.

1. *A. being seised of a house, with stables, yards, gardens, &c. and eighteen acres of land, adjoining, by his will, devised to his wife as follows: "And also that large and convenient dwelling-house, together with all the appurtenances and privileges thereunto belonging, and the same, which is now improved by me, as a boarding-house."* It was held that not only the barn, stables, and out-houses, but the land, consisting of orchard, pasture, plough and woodland, all of which had been used by the testator, as appurtenant to his boarding-house, and conducive to its support, passed by the will; especially, when, from the other parts of the devise, such was the evident intention of the testator.

Jackson, ex dem. White and others, v. White, 59

2. *A., by his last will, devised as follows: "As touching such worldly estate, wherewith it hath pleased God to bless me, I give, devise, and dispose of the same, in the following manner and form:*

"First, I give to Jeremiah, my eldest son, forty pounds, to be levied out of my estate; to my son Jacob forty pounds, &c.; to my daughter E. five dollars, &c.; to my youngest son, James, I give and bequeath a certain lot, &c. Also, to my beloved son, Henry, I give and bequeath all this certain lot of land which I now possess, with the farming utensils," &c.; and added, "all these legacies before mentioned, to be paid on the 1st of May, 1805, and to be raised and levied out of my estate," and then appointed his son Henry, and another person, his executors. It was held, that Henry took an estate for life only, it being contingent, whether the devise would be chargeable with the payment of the legacies. *Jackson, ex dem. Harris, v. Margaret Harris,* 141

POWER.

1. The act limiting the period of bringing claims and prosecutions against forfeited estates, passed the 29th of March, 1797; (sess. 11. c. 52,) does not extend to, or bar the claims of

I N D E X.

the *widows* of persons attainted, for their *dower* in the estates forfeited and sold by the commissioners of forfeitures. *Hogle, Widow, &c. v. Stewart,* 104

2. A widow's dower, not being within the purview of the act relative to partition, her rights cannot be affected by a partition; nor is she liable for any part of the *costs* and expenses of making the partition. *Bradshaw v. Callaghan & Wife,* 558

so as to subject him to the payment of costs, &c.; it was held, that the authority given by *A.* to *B.* being conditional and limited, *C.* followed the directions of *B.* at his peril, and had no right to use the name of *A.* so as to subject him to any costs or expenses; and that *A.* was entitled to recover of *C.* the amount of the costs which he had been compelled to pay. *Bradt v. Walton and Vanhorne,* 298

2. In an action of ejectment against a purchaser of land under a sheriff's sale, the regularity of the execution cannot be questioned. *Jackson, ex dem. M'Crea, v. Bartlett,* 361

3. Where there was no uncertainty as to the true location of two adjoining lots of land, as originally made, near forty years ago, the single fact that one of the lessors in ejectment had, about eight years ago, shown to the defendant a mistaken line, as the true line, was not sufficient, of itself, to conclude the lessors, or to set aside a verdict for the plaintiff. *Jackson, ex dem. Whitman v. Douglas,* 367

4. An equitable title or resulting trust cannot be set up as a defence in an action of ejectment against the legal title. *Jackson, ex dem. Kemball, v. Van Slyck,* 487

5. The death of the lessors of the plaintiff in an action of ejectment, before the trial, does not abate the suit. *Frier and Cooper v. Jackson, ex dem. Van Alen, in error,* 495

E

EJECTMENT.

1. *A.* having purchased a lot of land of *B.* the title of which was doubtful, released and reconveyed to *B.* all his right and title to the lot; and at the request of *B.* consented that *B.* might use the name of *A.* in an action of ejectment to recover the land, but *A.* was not to be at any further expense, or have any thing to do with the suits or lots in question, except as to the using his name, if necessary. *B.* employed *C.* an attorney, to bring an action of ejectment, and told *C.* that *A.* had consented to let his name be used, and *C.* accordingly used the name of *A.* as one of the lessors. The plaintiff in the suit was nonsuited, in consequence of which *A.* as one of the lessors, was obliged to pay the costs. *A.* brought an action on the case against *C.* the attorney, for using his name without his consent,

INDEX.

ERROR.

1. Where some of the defendants in the court do not join in bringing the writ of error, *it seems* that they ought be summoned and severed. *Bradshaw v. Callaghan and Wife*, 558
2. A judgment may be affirmed in part, and reversed in part, *ib.*

ESCAPE.

After an *escape* by the defendant from custody on a *ca. sa.* the plaintiff may proceed against the sheriff for the escape, and at the same time take out a *fieri facias* against the property of the defendant, for the remedies are not inconsistent with each other. *Jackson, ex dem. M'Crea v. Bartlett*, 361

See SHERIFF.

ESCROW.

See SHERIFF, 13.

EVIDENCE.

1. *A.* by a written contract, agreed to receive of *B.* sixty shares of the *Hudson* bank, on which ten dollars *per share* had been paid, and to deliver *B.* his note for 667 dollars and pay him the balance in cash; and also to pay five *per cent.* advance. The nominal amount of each share being fifty dollars; *parol* evidence was held admissible, to explain the

VOL. VIII.

57

written contract, or whether the five *per cent.* advance was to be paid on the sum paid in on each share only, or on the nominal amount. *Cole v. Wendel*, 116

2. Where the witnesses to a written contract were the sons of the defendant who executed the contract, and the plaintiff, the day before the setting of the circuit, inquired of the defendant for the witnesses, in order to *subpoena* them, and was falsely told by the defendant that they were gone on a journey; this was held not to be a sufficient reason for admitting other testimony of the hand-writing; the plaintiff not having used sufficient diligence to procure the witnesses. *Mills v. Twist*, 121

3. In an action of ejectment, the lessor of the plaintiff resided in *England*, and claimed to be heir of the person who died seised of the land in question. A witness here, deposed that he knew the ancestor, and had charge of the land, as his agent, and corresponded with him, and after his death with the lessor, who sent him a power to act for him, as heir and devisee, and that his information was also derived from persons acquainted with the family of the lessor; it was held that this was sufficient evidence, *prima facie*, of pedigree or heirship, to go to the jury. *Jackson, ex dem. Ross, Wilson and others, v. Cooley*, 128

4. *Hearsay* evidence is sufficient to prove a pedigree, *ib.* 449

INDEX

5. The acknowledgment of a deed from persons describing themselves as heirs, taken according to the directions of the act, before the *mayor of London*, is also a circumstance of weight in evidence of *pedigree*, *ib.*
6. Where a note is given to settle an account, the plaintiff cannot give in evidence the *account*, nor can he give *parol* evidence of the contents of the note, unless he clearly shows that the note has been lost or destroyed. *Angel v. Felton*, 149
7. The time of payment is part of the original contract, and if no time of payment is expressed in a note, the law adjudges it to be payable immediately; and *parol* evidence is inadmissible to show a different time of payment. *Thompson v. Ketcham*, 189
8. In an action by an administrator for *money lent*, the book of account containing the original entries in the hand-writing of the intestate, is not admissible evidence for the plaintiff. *Case v. Potter*, 211
9. But, *it seems* that the regular entries of a party in his books, made in the usual course of his business, though not admissible alone, or as conclusive evidence may (in consideration of usage which may have crept in, or the difficulty of proof in many cases of the sale and delivery of goods) be admitted, in connection with other circumstances, as evidence to the jury *ib.*
10. A contract must be proved as laid in the plaintiff's declaration. He cannot give in evidence an *entire* contract relating to two distinct subjects, when he declares only as to one of them. *Crawford v. Morrell*, 253
11. *Parol* proof to show a mistake in a *note* or written agreement, is inadmissible. *Fitzhugh v. Runyon*, 375
12. In an action of trespass, for taking and impounding the *hogs* of the plaintiff, the defendant proved that he acted as the agent and servant of *G.* on whose land the hogs were found; and offered *G.* as a witness, after executing a release to him, to prove that the hogs were taken *damage feasant*; and it was held that *G.* was a competent witness. *Hasbrouck v. Lown*, 377
13. Where the witness declares on his *voire dire* that he is interested in favor of the party calling him, and that his interest is so circumstanced that he cannot be released, the witness ought not to be sworn, though, in strictness, he is not interested; but if his supposed interest is against the party calling him, he ought to be admitted. *The Trustees of Lansingburg v. Willard*, 428
14. A special agreement for the exchange of notes, with a warranty of the note exchanged, cannot be given in evidence in support of the *money counts*. *Richardson v. Smith*, 439

I N D E X.

15. *It seems*, that evidence of what a witness since deceased swore at a former trial, between the same parties, is not admissible, unless accompanied by the *postea* or *record* of the former suit. *Beals v. Guernsey*, 446

See DEED, 5. ASSUMPSIT, 1. SHERIFF, 2. TROVER. COVENANT, 4. PLEADINGS, 20.

EXECUTION.

1. The agent of the plaintiff delivered an execution to a sheriff, and directed him to levy it on the property of the defendant, but said to the sheriff that he supposed the plaintiff did not wish to distress the defendant, and that if the property remained in the possession of the defendant, after the levy, the plaintiff would not hold the sheriff responsible, if it was squandered, and that he need not take a receipt for it. The sheriff, after levying on the goods of the defendant, did nothing further, until after the execution had expired, and a second execution was delivered to him, when he sold the property on both executions. It was held, that as there were no instructions from the plaintiff to delay the execution, after the seizure, nor any agreement between the plaintiff and the defendant to let the first execution sleep in the sheriff's hands; nor any evidence of such a delay as would afford a legal presumption of fraud, the first execution did not lose its preference. *Doty v. Turner*, 20

2. Where the sheriff returns that he has a certain sum made by virtue of the execution, ready to deliver to the party entitled, this is a sufficient evidence of a receipt of the money, to charge him with the amount, though in fact no money was actually received by him, *ib.*

3. Where a sheriff justifies under a *fieri facias*, it is not necessary that he should show that it is returned, nor will the want of an endorsement on the execution, of the time it was received by the sheriff, render it inadmissible in evidence: for the statute is merely directory to the sheriff, on this point, and the time of receiving it may be shown by *parol proof*, or otherwise. *Beals v. Guernsey*, 52

4. Judgment having been obtained against a defendant on a bond, payable by instalments, an execution was issued to collect the amount due on the first instalment, and the sheriff sold a tract of land of the defendant's, worth 7,000 dollars, which was purchased by *A.* for 1,670 dollars, as the highest bidder. Another execution was afterwards issued to collect the amount due on the second instalment, and the same tract of land was again taken by the sheriff, and advertised for sale. *A.* the purchaser under the first sale, applied to the court, on affidavit, to stay all further sale of the land; but the court refused to interfere, saying the party who has title must be left to his legal remedy. But, *it seems*, that the land in the 451

I N D E X.

hands of the purchaser, under the first sale, is no longer bound by the judgment; it being presumed that the land sold for its value, and the purchase is to be considered absolute, in regard to the lien or judgment; that the proper course, in all sales of real and personal property, is to sell so much of the property charged, as will probably satisfy the execution, and which can conveniently and reasonably be sold separately. *Hewson v. Deygert*, 333

5. It is irregular to issue a second execution, until the first is returned. Though where an execution has issued unadvisedly, it may be withdrawn before any thing is done upon it; yet where a sale has been made under an execution, and the sheriff died without executing a deed, it was held irregular to withdraw and suppress the execution, and issue a second to the new sheriff, for the purpose of selling the property a second time. Whether the sale on the first execution was *bona fide*, or fraudulent, the court will not decide, on motion. *Cairns v. Smith*, 337

6. Separate suits were brought against *A.* and *B.* two joint obligors on a bond, payable by instalments, and a *ca. sa.* was afterwards issued against *B.* for the costs taxed in the suit against him, and not for the instalment, from which he was discharged after paying the costs. It was held, that the discharge of *B.* from the *ca. sa.* for the costs, was no discharge of *A.* the co-obligor, nor a satisfaction of the debt for which *A.* was imprisoned. *M'Lean v. Whiting*, 339

7. Where two judgments in favor of different plaintiffs against the same defendant, were filed and docketed on the same day, and one of them took out a *fi. fa.* and had the lands of the defendant seized and advertised for sale, by the sheriff, three weeks before the execution on the other judgment was delivered, and the sheriff afterwards sold the land under the advertisement; it was held, that the first *fi. fa.* having been begun to be executed, before the second was delivered to the sheriff, had gained a priority, as to the time of sale, which could not be defeated by the second execution. *Adams v. Dyer*, 347

8. In an action of ejectment against a purchaser of land under a sheriff's sale, the regularity of the execution cannot be questioned. *Jackson, ex dem. M'Crea v. Bartlett*, 261

9. If an execution issue after a year and a day, without a revival of the judgment by a *scire facias*, it is only voidable at the instance of the party against whom it issued, *ib*

10. After an *escape* by the defendant from custody on a *ca. sa.* the plaintiff may proceed against the sheriff for the escape, and at the same time take out a *fieri facias* against the property of the defendant for the

INDEX.

remedies are not inconsistent with each other, *ib.* 3. Taking out letters of administration made legal all acts which were before *tortious*, *ib.*

11. A purchaser at a sheriff's sale cannot be affected by any matter subsequent to the sale, arising between the parties to the judgment to which he is a stranger, *ib.*

12. An execution does not bind the goods of the debtor until delivered to the sheriff. *Beals v. Guernsey*, 446

See SHERIFF.

EXECUTORS AND ADMINISTRATORS.

1. Where *A.* administrator of *B.* deceased, gave a promissory note to *C.* by which he "promised to pay *C.* sixty-one dollars and seventy-two cents, for value received by *B.* and his heirs, on demand, with interest until paid," the note was held to be void, for want of consideration. *Ten Eyck and others, v. Vanderpoel*, 120

2. To a declaration against *A.* as executor of *B.*, the defendant pleaded in abatement, that *A.* died intestate, and letters of administration were afterwards granted to the defendant, &c. The plaintiff *replied*, that previous to granting the letters of administration, the defendant made himself executor *de son tort*, &c. On demurrer, the replication was held to be bad, and the declaration was quashed. *Rattoon and another v. Overacker, Executor of Craig* 126

See EVIDENCE, 6, 7. PLEADINGS, 18, 19.

EXTINGUISHMENT.

See RELEASE, 1. PROMISSORY NOTE, 1.

F

FORCIBLE ENTRY AND DETAINER.

1. The *record of conviction*, by a justice, under the *act to prevent forcible entries and detainers*, (sess. 11. c. 6,) is not traversable; and if it shows that the justice had jurisdiction, and proceeded regularly, it is conclusive; and a bar to any suit brought against the justice. *Mather v. Hood*, 44

I N D E X.

2. On an indictment for the forcible entry and detainer of a *church*, &c. it was held, that the trustees of a church, as such, can only be in possession constructively, and that the possession of the key of the church, by one of them, is *prima facie* evidence of possession; but it does not preclude all inquiry as to the fact, who were the legal trustees, at the time of the entry. *The People v. W. Runkle*, 464

verdict for the plaintiff, on which the judgment was rendered: It was held, that the question of reasonable notice or due diligence, was a question compounded of law and fact, and proper to be submitted to a jury; and having once been fairly litigated and decided, it was not again to be investigated, in an action brought in this state, on the judgment. *Taylor v Bryden*, 173

FOREIGN LAWS.

See FOREIGN JUDGMENT.

FOREIGN JUDGMENT.

1. An action cannot be maintained in this state, on a judgment recovered in another state, against *bail*, where the proceeding was by attachment of goods, without any *personal* summons or actual *notice* to the bail, who at the time, had removed into, and become an inhabitant of this state. There is no difference, in this respect, between a suit against *bail*, or a suit against the principal. *Robinson v. The Executors of Ward*, 86

2. An action of *assumpsit* was brought on a judgment obtained against the defendant, in *Maryland*, as *endorser* of a bill of exchange, and it appeared that the plaintiff had declared in the suit in *Maryland*, on a protest for *non-payment*, as well as *non-acceptance* of the bill, and the cause was there tried by a jury, who found a

3. A judgment obtained in another state, is *prima facie* evidence of a just debt; and it is incumbent on the defendant to impeach the justice of it, or to show, by positive proof, that it was irregularly and unfairly obtained, *ib.*

4. The *lex loci contractus* is to govern, unless the parties, by the *terms* of the contract, had in view a different place. *Thompson v. Ketcham*, 189

5. Where the defendant in an action brought here, on a promissory note made in *Jamaica*, set up *infancy* as a defence, it was held, that he was bound to show that such a plea would be a good defence in *Jamaica*, *ib.*

6. A suit was commenced in 1803, in the state of *Vermont*, against *A.* as *trustee* of *B.* an absconding debtor, and in 1808, judgment was given against *B.* It having appeared that *A.* had moneys of *B.* more than sufficient to pay the plaintiff, it was ordered that the plaintiff should have execution against the goods, &c. of *B.* in the

I N D E X.

hands of *A.* But *A.* had, in 1806, removed to this state, where he had continued to reside, so that the execution was returned unsatisfied; and the court thereupon granted a rule on *A.* to show cause why the plaintiff should not have execution against him, of his own proper goods, &c. which rule was served on *A.* in this state, being an inhabitant thereof; and he not appearing to show cause, a judgment was given against him by the court in *Vermont*, for the whole of the debt, and execution awarded against his own estate. On this judgment against *A.* the plaintiff brought an action of debt in this state; and it was held, that to warrant the judgment against *A.* in his own person, or property, there should have been a new suit against him, or a personal summons or notice, in the nature of a *scire facias*; and that the service of a rule to show cause upon him, in this state, being void, there was nothing to warrant the judgment, and that no action could be sustained upon it here. *Fenton, Administrator of Ramsdall, v. Garlick,* 194

drew a promissory note for the amount, under which *C.* wrote, "I guaranty the above;" and the goods were thereupon delivered; this was held to be a *collateral* undertaking of *C.*; but that there was no necessity for any distinct consideration, passing directly between *B.* and *C.*; for being all one entire transaction, the delivery of the goods to *A.* supported the promise of *C.* as well as the promise of *A.*; and that the words *value received*, in the note, were sufficient evidence of a consideration on the face of the writing; but if any doubt existed, *parol* evidence was admissible to show the consideration, or that it was one original and entire transaction. *Leonard v. Vredenburgh,* 29

2. Where the plaintiff declared on a *parol* contract, to pay him for certain land given for a public highway, and the contract proved was, that the defendant was to pay the plaintiff, not only for the land given for the highway, but also for a distinct and separate piece of land; it was held, that the latter part of the contract being void by the statute of frauds, the whole, being an entire contract, was void. *Crawford v. Morrell,* 253

FORFEITED ESTATES.

See DOWER, 1. ATTAINER.

FRAUD.

1 Where *A.* applied to *B.* for goods on credit, and *B.* refused to let him have them without security, on which *A.*

3. Where *A.* in consideration that *B.* would deliver him all his household goods, and that *C.* would discharge *B.* from execution, promised to pay *C.* the amount of the execution; this was held to be an original undertak- 455

INDEX.

ing, and not within the statute of
fraude. *Skilton v. Brewster*, 376

4. Though a purchaser of goods *knows*
of a judgment against the vendor, at
the time of the sale, the fact will not,
of itself, render the sale fraudulent
or void; but if he *knows* of the judg-
ment, and purchases with the view,
and for the purpose of defeating the
creditor's execution, it is fraudulent,
and the sale is void, notwithstanding
a full price has been paid by the pur-
chaser. The sale must be, *bona fide*,
as well as for a good consideration.
Beals v. Guernsey, 446

5. The *non-delivery* of the goods to the
vendee, at the time of the sale, is
only *prima facie* evidence of fraud,
and may be explained by circum-
stances, *ib.*

GAOLER.

It seems, that a special action on the
case will not lie against a gaoler, at
the suit of the sheriff, for a negligent
escape; but that the *gaoler* is an-
swerable to the *sheriff* only in an ac-
tion of *assumpsit*, on his implied un-
dertaking, to serve the *sheriff*, with
diligence and fidelity. *Kain and
others, Executors of Rhea, v. Ostran-
der*, 207

double the debt and costs for which
the prisoner was committed; but the
excess consisted of officer's fees on
the execution; this was held a good
bond within the statute. *Smith and
others v. Jansen*, 111

2. In an action of debt on such bond,
the suggestion of the breach gene-
rally, in the words of the condition, is
sufficient, without alleging the par-
ticular damages. *Smith and others
v. Jansen*, *ib.*

3. Where a defendant had been surren-
dered by his bail, and was permitted
by the sheriff to go at large within
the liberties of the gaol, on giving se-
curity by bond, according to the stat-
ute, and a *ca. sa.* at the suit of the
plaintiff was afterwards delivered to
the sheriff, who did not take a new
bond, and the defendant, on the next
day, went beyond the liberties; it
was held, in an action for an escape,
on the execution, that the mere de-
livery of the *ca. sa.* was not, *ipso facto*,
et eo instanti, an arrest, so as to
place the defendant in custody, on
the execution, and that the sheriff
was not liable. *Tracy and another
v. Whipple*, 379

SEE PLEADINGS, 6, 7.

GRANT.

1. Where the penalty of a bond for the
gaol liberties, was taken for more than
456 -

GAOL LIBERTIES.

1. A grant to be valid must be to a cor-
poration, or to some certain person
named, who can take by force of the
grant, and hold in his own right, or

I N D E X.

as a trustee. *Jackson, ex dem. Cooper and others, v. Cory,* 385

2. The construction of a grant is matter of law; but its legal effect, deducible from its terms or matter subsequent, which, by showing the sense of the parties, may authorize a larger or narrower construction, so as to include or exclude the premises in controversy, is matter of fact for a jury only to decide. *Frier and others v. Jackson, ex dem. Van Alen,* in error, 495

apprentice, being brought up on *habeas corpus*, the court refused to order the infant to be delivered to the father there being no evidence of any improper restraint on the part of the master, but gave the infant leave to go where he pleased. *In the matter of the M'Dowles,* 328

3. Where it appeared from the face of the plaintiff's declaration in the Court of Common Pleas, that the demand was certain, so that he could not, in any event, recover two hundred fifty dollars, though the damages demanded, in the conclusion of the declaration, were three hundred dollars, and the court proceeded in the cause notwithstanding the defendant had filed, in open court, a *habeas corpus*, to remove the cause, which had been duly allowed; this court refused to grant an attachment against the judges of the Court of Common Pleas for not obeying the writ. But where the demand appears to be uncertain, so that the plaintiff might recover above two hundred fifty dollars, the writ must be obeyed and returned. *Shotwell v. Daniels,* 341

H

HABEAS CORPUS.

1. Where a cause is removed from a court of common pleas into this court, by *habeas corpus*, the plaintiff may declare in this court for a different cause of action, and for a demand which has accrued subsequent to the commencement of the suit below, and prior to the removal of the cause into this court; and the defendant may, in like manner, plead or set off any demand which has accrued subsequent to bringing the action below, and prior to its removal to this court; but he cannot plead the *statute of limitations, or coverture*, or matter subsequently arising, that does not go to the merits of the plaintiff's demand. *Vosburgh v. Rogers,* 91

APPRENTICE.

HIGHWAY.

HUSBAND AND WIFE.

2. Where an infant, who was bound an 1. If a husband and wife part, by con-
VOL. VIII. 58 457

I N D E X.

sent, and the husband secures to her a separate maintenance, suitable to his condition in life, and pays it, according to agreement, he is not liable for articles furnished to his wife; not even for necessaries. And the general reputation of the separation will be sufficient. But where the agreement on the part of the husband to pay a certain sum to his wife, or a separate maintenance, was not reduced to writing, and no evidence of any payment having been made by him to her, he was held liable for goods furnished to his wife, during the separation. *Baker v. Barney*,

72

2. The husband cannot be sued alone, for the debt of his wife, contracted before their marriage. *Angel v. Felton*,

149

and decided in the District Court.
Hoyt v. Gelston & Schenck, 179

INSURANCE.

1. Policy of insurance, on goods, dated 21st of *December*, 1808, "at and from *Bristol* to *New-York*. Waranted to have sailed, between the 20th of *October* and the 1st of *December*, 1808." The cargo was wholly laden on board the vessel, at *Bristol*, before the 1st of *December*, 1808, and the vessel sailed from *Bristol* for *New-York*, after the 1st, and before the 21st of *December*, 1808, and arrived in safety. In an action of *assumpsit*, brought by the insured for a return of the premium, on the ground of a non-compliance with the warranty, it was held, that the warranty, as to sailing, applied only to the *voyage*, and not to the risk *in port*, and the policy attached on the goods in port; and a risk having been run, there could be no return of premium. *Hendricks v. The Commercial Insurance Company*, 1

I

IMPARLANCE.

In an action of *trespass* against the collector of the port of *New-York*, for seizing the vessel of the plaintiff, against which a *libel* was filed in the *District Court* of the *United States*, under a law of the *United States*, but which had not been heard or determined, on account of the sickness of the judge; this court refused to grant the defendant an *imparlance* indefinitely, until the *libel* could be heard

458

2. A policy of insurance contained a clause, "that if the vessel upon a regular survey, should be declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage, on account of her being unsound or rotten, the insurers should not be bound to pay their subscription." The *survey* stated injuries arising from storms, besides the decay of her timbers. It was held, that as the *survey* and con-

I N D E X.

demnation for unseaworthiness did not proceed on the *sole* ground of rottenness or decay, but on that fact connected with other matters, it was not conclusive, and the insured were entitled to recover. *Haff v. The Marine Insurance Company*, 163

3. Insurance was made to the amount of 15,000 dollars, on "goat skins *valued* at fifty cents each," and the policy contained the usual clause, as to prior insurance. A prior insurance had been made by an open policy, on the *cargo*, on board the same ship, for the same plaintiffs, to the amount of 22,000 dollars. The *prime cost* of the skins was ten cents each. Estimating the skins at fifty cents each, and the rest of the cargo at the invoice prices, and deducting the prime cost of the skins, the amount was sufficient for both policies; but the cargo, exclusive of the skins, was not sufficient to absorb the prior insurance. In an action on the second policy it was held, that the whole of the goat skins were to be valued at fifty cents; and after deducting from this amount the difference between the invoice price of the cargo and charges, exclusive of the goat skins, and the 22,000 dollars on the amount of the prior insurance, the residue would be the interest covered by the second policy; that it was immaterial whether the first policy was open or valued, if the skins, at fifty cents each, would furnish interest sufficient for both policies. The valuation in a policy is

conclusive on the insurers, if there is no fraud or imposition. *Kane v. The Commercial Insurance Company of New-York*, 229

4. Insurance on *goods*, from *New-York* to *Leghorn*. The vessel and cargo were captured by the *French*, and carried into *Ferraja*. The ship and cargo were proceeded against by the captors, in the *Council of Prizes*, at *Paris*, which court decided that the capture was illegal, and ordered a restitution of the property, with costs and charges. The captors appealed to the *Council of State*, and by arrangement between them and the consignees, the property was delivered to the consignees, on their giving a bond to the amount of the *appraised value* of the property, to abide the determination of the appeal. The property was appraised at fifty *per cent.* above the *prime cost*, and a bond given for the amount, which was greater than the sum insured. The cargo was taken to *Leghorn*, and there sold by the consignees, at an advance beyond the amount at which it was appraised. The *Council of State* reversed the decree of the *Council of Prizes*; and, on reference of the decision of the *Council of State* to the *emperor of France*, he confirmed the sentence and declared the ship and cargo to be good and lawful prize. The consignees having been obliged to pay the bond, the insured brought an action on the policy, for the amount insured.

It was held that the insured was not

I N D E X.

bound to *abandon* for a total loss, but might recover the amount paid on the bond, or as much as was covered by the insurance, as a partial loss. The *spes recuperandi*, in such a case, is not the subject of abandonment, for its value cannot be computed by a jury. But there can be no *spes recuperandi*, where the sentence of condemnation has been affirmed, in the *last resort*, or by the definitive sentence of the highest tribunal of the country. *Gracie v. New-York Insurance Company*, 237

5. *A.*, the owner of a vessel, by a charter-party, let the whole vessel to *B.*, the master, for four months, and *B.* covenanted to victual and man the vessel, at his own cost. Goods were shipped by different persons for *St. Thomas*, but the master, instead of going to *St. Thomas*, went to *Porto Rico*, and there disposed of the cargo, and the vessel was sold. *C.*, a shipper of goods, brought an action on a policy of insurance, for a total loss, by barratry of the master. It was held, that the master was owner, *pro hac vice*, and though his conduct was in itself *barratrous*, yet, being owner for the voyage, it did not amount to *barratry*; and the insurers were therefore not liable. The rule of law is general, and is applied as well to the innocent owner of goods as to the owner of the ship, who consents to the fraud of the master. *Hallet v. The Columbian Insurance Company*, 272

6. Insurance from *New-York* to *Leghorn*. 460

horn. The vessel sailed from *New-York* the 1st of *November*, 1807. On the 9th *January*, 1808, within the straits, and about sixty or seventy leagues from *Leghorn*, the vessel was boarded by a *British* ship of war, the commander of which endorsed her register, warning her not to proceed to *Leghorn*, nor to any port of *France*, or *Spain*, *Portugal*, *Holland*, *Denmark*, *Tuscany*, *Naples*, *Ragusa*, the republic of the *Seven Islands*, or to any other country at war with *Great Britain*, or from which the *British* flag was excluded, under pain of being confiscated, such ports being declared to be in a state of blockade, by the *British* orders in council of the 11th of *November*, 1807, and the vessel was warned not to proceed to any such ports, without first stopping at a *British* port. The vessel put into *Gibraltar*, where the captain was informed of the *French* and *Spanish* decrees, and was refused a clearance to any but a *British* port. Under these circumstances, and fearing a capture, in case he proceeded to any port in the *Mediterranean*, the captain took a clearance for *Falmouth*, and sailed for that place under *British* convoy, where he arrived on the 25th *March*, 1808. The insured abandoned for a total loss.

It was held that neither the fear of capture and condemnation, nor the circumstances in which the vessel was placed, afforded a justifiable cause for abandoning the voyage, and that the insurers were discharged. The endorsement, on the register,

INDEX.

and warning by the *British* cruiser, was not an act of *search*, or a *visit*, within the construction of the *Milan* and *Aranjuez* decrees, or the law of nations; nor was the vessel under the restraint of priaces at *Gibraltar*, a clearance not being essential, and the threat of *British* capture did not amount to such a restraint. *Corp and others v. The United Insurance Company*, 277

9. Where a ship on a voyage from *Petersburgh* to *New-York*, met with an accident, by the perils of the sea, in consequence of which she put into *Copenhagen*, from necessity, in order to refit, it was held that the wages and provisions of the crew, the expenses of unloading, repairing, reloading, storage, &c. from the time of the accident, until the ship was again ready to sail, were general average; a proportion of which was to be paid by the insurer on the *cargo* in addition to a total loss, the cargo having been forcibly detained by the order of the *Danish* government, *ib.*

7. The clause in the *New-York* policies of insurance, that the loss is to be paid in thirty days after proof of interest and loss, is merely to furnish reasonable information to the insurer, and is liberally construed, to require only the best evidence of the fact in the possession of the party, at the time. *Barker v. Phenix Insurance Company*, 307

8. On the 5th of *October*, the insured made an abandonment in writing, accompanied with a copy of a letter from the master of the ship to the correspondents of the insured, stating the fact and causes of loss, and on the 21st of *October*, the insured delivered to the insurers all the requisite documents, containing full proof of interest and loss, and renewed his claim for a total loss; and at the expiration of thirty days thereafter brought his action. It was held, that the act of abandonment on the 5th of *October*, was valid and sufficient to fix the technical loss, and that the preliminary proofs were sufficient to entitle the insured to bring his action, admitting that they were not suffi-

cient on the 5th *October*, for the whole might be considered as one entire transaction. *Barker v. Phenix Insurance Company*, 307

10. Where the insurance was expressed to be on the "good *American* ship called the *Rodman*," it was held to be a warranty that the ship was *American*, and proof that she was owned by an *American* citizen, and had all the papers for an *American* vessel, except a register, having sailed with a *sea letter* only, was held to be sufficient evidence of a compliance with the warranty, *ib.*

11. A vessel was insured from *New-York* to *Teneriffe* at a premium of five and a half per cent. and for an additional premium of two per cent. permission was given to proceed from *Teneriffe* to the *Isle of May* and *Bonavista*, and at and from thence to *New-York*, to return one per cent. if the

INDEX.

vessel did not proceed to *Bonavista*, and the risk ended safely. The vessel arrived at *Tenerife*, but was refused permission to enter or land any part of the cargo until after performing a quarantine of 40 days, because her bill of health was not signed by the *Spanish* consul, at *New-York*, and the master not choosing to perform the quarantine, went to *Maderia*, the nearest port where he could enter and land his cargo, and there sold and delivered the cargo, and then proceeded to the *Isle of May*, and there took in a cargo and arrived at *New-York*; but having suffered damage from the perils of the sea in her voyage home, an action was brought on the policy, to recover a partial loss: it was held, that the going from *Tenerife* to *Maderia* was a *deviation*, but that the insured were entitled to a return of premium of one *per cent.* that part of the voyage to *Bonavista* never having commenced. *Robertson v. The Columbian Insurance Company*, 491

J

JUDGE.

A judge is not liable to arrest by process issuing out of his own court, but must be proceeded against by *bill*. *In the matter of W. Livingston*, 351

JUDGMENT.

1. Judgment having been obtained against the defendant on a bond, payable by instalments, an execution was issued to collect the amount due on the first instalment, and the sheriff sold a tract of land of the defendant's, worth 7,000 dollars, which was purchased by *A.* for 1,670 dollars, as the highest bidder. Another execution was afterwards issued to collect the amount due on the second instalment, and the same tract of land was again taken by the sheriff, and advertised for sale. *A.* the purchaser under the first sale, applied to the court, on affidavit, to stay all further sale of the land; but the court refused to interfere, saying the party who has title must be left to his legal remedy. *Hewson v. Deygert*, 333

INTEREST.

In an action of *trespass* for taking the goods of the plaintiff, as well as in *trover*, the jury in their discretion, may allow, besides the value of the goods at the time of the *trespass*, interest on the amount, from that time to the judgment, by way of damages. *Beals v. Guernsey*, 446

See MASTER OF SHIP.

2. But it seems that the land in question in the hands of the purchaser under the first sale, is no longer bound by the judgment; it being presumed that the land sold for its value, and the purchase is to be considered as absolute, in regard to the lien or judgment; that the proper course in all sales of real and personal property

I N D E X.

is to sell so much of the property charged as will probably satisfy the execution, and which can conveniently and reasonably be sold separately, *ib.*

3. When two judgments in favor of different plaintiffs against the same defendant, were filed and docketed on the same day, and one of them took out a *fi. fa.* and had the lands of the defendant seized and advertised for sale, by the sheriff, three weeks before the execution on the other judgment was delivered, and the sheriff afterwards sold the land under the advertisement; it was held, that the first *fi. fa.* having been begun to be executed, before the second was delivered to the sheriff, had gained a priority, as to the time of sale, which could not be defeated by the second execution. *Adams v. Dyer,* 347

4. Whether the court will inquire into parts of a day, or receive affidavits of the exact time of filing different judgments on the same day, so as to determine the priority of the lien? *dubitatur,* *ib.*

5. Whether the clerks ought not to mark the exact time or hour of filing judgments? *quære,* *ib.*

JUROR.

Where a juror summoned in a cause before a justice, had said "that if the reports of the neighbors were cor-

rect, the defendant was wrong and the plaintiff was right," this was held not to be a sufficient objection to his being sworn and empanelled. *Durrell v. Mosher,* 445

JUSTICE'S COURT.

1. On a return to a *certiorari*, the promise on which the suit below was brought, was presumed to be an express promise in writing when no fact appeared to the contrary. *Holly v. Rathbone,* 148

2. In an action for *deceit*, before a justice, a plea of a former suit by the defendant against the plaintiff on a *contract*, in which the present plaintiff neglected to set off his demand, is no bar. *Dean and another v. Alken,* 390

3. Where a justice adjourned a cause, on the suggestion of the plaintiff, that the defendant had agreed to an adjournment, and on the affidavit of the plaintiff, of the absence of a material witness, without showing due diligence to procure his attendance, it was held that the justice had not an unlimited discretion to adjourn at the suggestion of the plaintiff, and that such adjournment was a discontinuance of the cause. *Proudfit v. Henmar* 391

4. Where a person who is security for the defendant, in an action before a justice, is a material witness for the defendant, he ought to be discharged, and new security taken, so that the 463

I N D E X.

defendant may have the benefit of his testimony. *Irwin v. Caryell*, 407

5. Where a justice, after a suit was commenced, moved into a part of a house where a tavern was kept, and there tried the cause, while the tavern was kept in the other part of the house; it was held that the justice, under the 18th section of the act, (sess. 31. c. 204,) had no jurisdiction, and his judgment was reversed. *Low v. Rice*, 409

6. Where a justice has a discretion, as to adjourning a cause, nothing but an abuse of such discretion will be regarded as error. *Pease v. Gleason*, 409

7. In a suit before a justice, an infant must appear by guardian. *Alderman v. Tirrell*, 418

8. The discretion given to a justice, by the 3d section of the act, (sess. 31. c. 204,) to adjourn the cause, is not an arbitrary discretion; but ought to be soundly and judiciously exercised. *Rose v. Stuyvesant*, 426

9. Where a constable, who has an execution, pays the amount to the plaintiff, without any demand of, or a request by, the defendant, he cannot maintain an action against the defendant for the money so paid without request. *Menderback v. Hopkins*, 436

10. Where no objection is made to the evidence given at a trial before a justice, but the whole is submitted to the jury, every inference will be drawn, and every reasonable intendment allowed, in support of the verdict. *Menderback v. Hopkins*, 436

11. In an action before a justice, it is too late for the party to ask for an adjournment of the cause, after the jury are sworn and empanelled. *Fink v. Hall*, 437

12. Where the jury do not retire from the court, to consider of their verdict, it is unnecessary that a constable should be sworn to attend them, *ib.*

13. In an action by the payee of a promissory note, against the maker, brought before a justice, the defendant pleaded that the note had been endorsed by the payee, and that the endorsee had sued the defendant on the note before another justice; but it appearing that in that suit the maker objected to the title of the endorsee, or to some defect in the endorsement, in consequence of which no recovery was had on the note, it was held that the plea was no bar, and that the defendant could not, in this suit, set up the endorsement as good, which he had, in the former suit shown, or attempted to show, to be bad. *M'Donald v. Rainor and another*, 442

14. Where a juror summoned in a cause before a justice, had said "that if the reports of the neighbors were correct, the defendant was wrong and the

I N D E X.

plaintiff was right," this was held not to be a sufficient objection to his being sworn and empanelled. *Durrell v. Mosher,* 445

15. In an action for a *deceit*, in the sale of a certain improvement, or patent right, before a justice, the defendant set up, in defence, a former trial, and judgment in an action brought by him before a justice, against the plaintiff, on a promissory note given for the purchase-money, in which suit the present plaintiff set up the *deceit* in the sale, as a defence against the note, and the same was considered by the justice, and a judgment given for the plaintiff, for the amount of the note; it was held, that the first trial and judgment was a complete bar to the second suit for the *deceit*. *Jones v. Scriven,* 453

16. A defendant was sued by *warrant*, before a justice; but it did not appear, from the return to the *certiorari*, whether the defendant was, in fact, proceeded against as a *freeholder* or person having a family, and that the requisite evidence was given to authorize the issuing a warrant; and the defendant prayed for an adjournment for want of a *materia witness*, and offered security to appear and stand trial; but the justice refused to grant an adjournment, unless the defendant would make oath that the witness was material, which being refused, the justice proceeded and gave judgment for the plaintiff. It was held that the defendant was en-

VOL. VIII.

59

titled to an adjournment, under the 4th sec. of the act; (*sess. 31. c. 204.*;) and the judgment of the justice was reversed. *Sebring v. Wheedon,* 458

17. In an action before a justice a *venire* was issued to summon a jury, which was delivered to the defendant. The defendant appeared at the time, but the *venire* was not returned, nor did the jury appear; and the justice, although the defendant objected, proceeded to try the cause, and gave judgment for the plaintiff. It was held that after a *venire* had been issued, the justice had no authority to try the cause without a jury, it not appearing that the *venire* was improperly suppressed by the defendant; and that the justice ought to have issued a second *venire*, the first not having been returned. *Sebring v. Wheedon,* 458

18. A justice of the peace has cognisance of an action of trespass on the case, for enticing away the wife of the plaintiff. *Chase v. Hale,* 461

19. *A.* sued *B.* before a justice, and before the return of the summons, *B.* settled with *A.* and paid him three dollars in full, and *A.* promised to go to the justice and pay the costs; but instead of doing so, he appeared at the return of the summons and obtained a judgment by default against *B.* for twenty-five dollars. *B.* then brought an action of *assumpsit* against *A.* before another justice, for a breach of the promise made by him, as to

465

INDEX.

the former suit, and recovered. It was held, that the action was sustainable; it not being for the purpose of overhauling the prior judgment, nor to recover back money which the defendant had unconsciously received; but for a breach of the promise to discontinue the former suit, and pay the costs. *B. was not bound to set off the demand for damages, for breach of the agreement, in the suit carried on against him by A. contrary to his promise.* *Cobb v. Curtiss,* 470

20. Where the justice himself is sworn as a witness, and no objection is made at the time, it will be deemed, on the return to the *certiorari*, to have been admitted by consent, *ib.*

See PLEADINGS, 15.

JUSTICES OF THE PEACE.

1. In an action of *trespass*, for taking the plaintiff's goods, the defendant justified, as a *constable*, under an appointment of three justices, pursuant to the 6th section of the "act (sess. 24. c. 78) relative to the duties and privileges of towns," passed 27th *March, 1801*, and that he took the goods as constable, by virtue of an execution issued against the goods of the plaintiff, &c. It was held, that the appointment made by the justices, was a judicial act; and being within their jurisdiction, was conclusive and valid, until set aside or quashed on

certiorari; and could not be questioned in a collateral action. *Wood v. Peake,* 69

2. An *order*, signed by *two justices*, to an overseer of the poor, to provide for the maintenance of a pauper, under the first section of the act of the 24th *March, 1809*, (sess. 32. c. 90,) is valid; and though such order does not recite that the justice and overseer inquired into the state and circumstances of the pauper, before giving the order, such an inquiry will be intended to have been made and implied from the order. The justice and overseer need not make the inquiry together, for the order is not to be their joint act. *Adams v. The Supervisors of Columbia County,* 323

3. Matters of form in orders for the relief of paupers, are to be overlooked, and the justice has a reasonable discretion, as to the nature and extent of the weekly allowance, and if the pauper be sick or wounded, medicine and the attendance of a physician, are a reasonable charge; but all the charges of maintaining the pauper must be adjusted and paid, in the first instance, by the overseers of the poor, who are responsible to the persons rendering the assistance. *Adams v. The Supervisors of Columbia County,* 323

See POOR. FORCIBLE ENTRY AND DETAINER, 1.

INDEX.

L

LEASE.

1. Letting land upon shares, for a single crop, does not amount to a *lease* of the land, and the owner alone can bring *trespass*. *Bradish v. Schenck*,

151

2. Where *A.* voluntarily delivered up and destroyed a lease of land, and took a new lease, and afterwards claimed under the old lease; it was held, that if the old lease was not duly surrendered by writing, within the statute of frauds, yet that *A.* could recover no more land than what he could prove, with absolute certainty, was covered by that lease, especially, after the premises claimed had been in possession of another, for near sixteen years. *Jackson, ex dem. Butler and others, v. Gardner*,

394

See DEED, 6. TRESPASS, 4.

LEGACY.

See DEVISE, 2.

LETTER OF CREDIT.

A. and *B.* addressed a letter of credit to *C.* saying, "If *D.* wishes to take goods of you on credit, we are willing to lend our names as security for any amount he may wish. May 30th, 1804." *D.* took goods of *C.* on credit several times, for which he

paid; and in December, 1805, took another parcel of goods on credit, for which he gave his note to *C.*, which was not paid. In an action brought by *C.* against *A.* and *B.*, it was held, that the letter of credit did not extend beyond the first parcel of goods delivered to *D.*, and that *A.* and *B.* were not liable for an indefinite time, but only to an indefinite amount, for one time. *Rogers & Lambert v. Warner & Bostwick*, 119

LIBEL.

Where the libellous words charged in the declaration, were, "but this is not the first time that the idea of falsehood and *M. B.* (meaning the plaintiff) have been associated together, in the minds of many honest men," (meaning, &c.) It was held, that evidence, that "sundry honest men, to wit, *A. B.* (naming seven persons) and others, believed and considered the plaintiff not to be a man of truth, but addicted to falsehood," was not admissible in justification; and that the defendant could only justify the charge by proving the fact. *Brooks v. Beniss*, 455

LIMITATION.

1. Lands descended to *A. a feme covert*, who had a daughter, *C.* born in 1756. *A.* died in 1764, and *B.* her husband died in 1784. *C.*, the daughter, married *D.* in 1783. An adverse possession was taken of the land in 1772, it being then vacant and un-

467

I N D E X.

cultivated; and *C.* after the death of her husband in 1807, brought an action of ejectment; it was held that *B.* being a tenant by the courtesy, no right of entry accrued to *C.* until after the death of *B.* in 1784, and that *C.* being then a *feme covert*, was not bound to bring her action in twenty years thereafter, but was protected by the statute during her coverture. *Jackson, ex dem. Beekman, v. Sellick,* 262

2. Where *A.* promised to pay a debt barred by the statute of limitations, in certain specific articles, it was held, that the promise was conditional, and that the plaintiff was bound to show that he offered, and was ready to accept, the specific articles. *Bush v. Barnard,* 407

LOCATION OF LAND.

Where there was no uncertainty as to the true location of two adjoining lots of land, as originally made, near forty years ago, the single fact that one of the lessors in ejectment had, about eight years ago, shown to the defendant a mistaken line as the true line, was not sufficient, of itself, to conclude the lessors, or to set aside a verdict for the plaintiff. *Jackson, ex dem. Whitman, v. Douglas,* 367

M

MAINTENANCE.

1. An action for *maintenance* will not lie against a person for carrying on a suit in the name of another, or assisting in its prosecution, if he has any legal or equitable interest in the land or subject of controversy. *Wickham, qui tam, v. Conklin,* 220

2. Though a person purchases a *pretended title*, and prosecutes a suit in the name of another, but for his own benefit; yet he is not liable to an action for *maintenance*, under the 9th section of the act to punish chamertry and maintenance, (*sess. 24. c. 87.*) *ib.*

3. *A.* in an action of ejectment against *B.* which was tried in *June*, 1810, recovered a verdict for land, worth 2,500 dollars, against the defendant, on which a judgment was rendered in *August* following. In *July*, 1810, *B.* executed a quit-claim deed for the same land, for the consideration of three hundred dollars, to *C.*, who knew, at the time, of the suit, trial and verdict, respecting the land. It was held, that the deed from *B.* to *C.* was void, under the 1st section of the "act to prevent and punish chamertry and maintenance." (*Sess. 24. c. 87.*) *Jackson, ex dem. Bryant, v. Ketcham and another,* 479

4. The purchase of land during the *pendency of a suit* concerning it, if made with a knowledge of the suit, and not in consummation of a previous bargain, is *chamertry*, though not punishable, under the statute, for selling a pretended title, *ib*

I N D E X.

MANDAMUS.

A mandamus will not lie, at the instance of the party, to compel the supervisors of the county to audit and pay the account of charges for the maintenance of a pauper, under the act. (*Sess. 32. c. 90.*) The supervisors are only to pay such accounts as have been adjusted and paid by the overseers, in pursuance of the justice's order. *Adams v. The Supervisors of Columbia County,* 323

MANUFACTURES.

See ACT TO ENCOURAGE THE MANUFACTURING OF WOOLLEN CLOTH, WITHIN THIS STATE. (*Sess. 31. c. 186.*)

MASTER OF A SHIP.

In an action on a bill of lading, for not delivering goods, stated to be embezzled or lost during the voyage, without the fraud of the master, it was held that the master was bound to answer for the value of the goods missing, according to the clear net value of goods of like kind and quality, at the port of delivery; but whether he is also to pay *interest* from the time when the goods ought to have been delivered, or not, depends on the circumstances of the case; but if no fraud or misconduct is imputable to the master, *interest* will not be allowed. *Watkinson v. Laughton,* 213

MILITARY LAND-TITLES.

See DEED, 1, 2, 3, 4.

MILITIA.

1. The master of a sloop sailing on the *Hudson* river, between *Poughkeepsie* and *New-York*, enrolled as a coasting vessel, and sailing under a license, is not a *mariner* employed in the sea service, and exempt from *militia* duty, within the purview of the *secona* section of the act of congress, (2d cong. sess. 1. c. 33,) passed *May 8th, 1792*, but is liable to *militia* duty, under the law of this state. *Brush v. Bogardus,* 157

2. Whether the decision of a *court martial* under the *militia* law, on a question of which they have due cognizance, can be reviewed or traversed in a collateral action? *quare, ib.*

MONEY COUNTS.

See EVIDENCE, 14.

MORTGAGE.

1. Where *A.* gave a regular bill of sale of three horses to *B.* for the consideration of two hundred ten dollars; and *B.* at the same time gave to *A.* a writing or defeasance, engaging, on the payment of the two hundred ten dollars, to him by *A.* in fourteen days, to deliver the horses to *A.* It was held, that this was a *mortgage* of the property, and not a technical *pledge*; and that *A.* not having paid nor ten- 469

I N D E X.

dered the two hundred ten dollars, within the fourteen days, the condition became forfeited, and the mortgagee had an absolute interest in the property, so that *A.* on a subsequent tender of the money to *B.*, and demand of the property and refusal, could not maintain *trover* for it. *Brown v. Bement and Strong*, 96

4. Whether the mortgage is now redeemable, or not, is a question for the Court of Chancery to decide, *ib*

N

NEW TRIAL.

2. A *mortgagee* of a ship *out of possession*, is not liable for repairs or necessities, furnished the ship. *M'Intyre & Bradford v. Scott*, 159

3. *A.* and his wife, in 1771, executed a mortgage in fee, of the land of his wife, to *B.*, and *A.* afterwards, in 1788, for the consideration of one hundred twenty-five pounds, granted and released the premises to *B.* the mortgagee, his heirs and assigns, for ever; and *B.* retained the mortgage in his hands, and made an endorsement thereon, by which he covenanted not to bring any action against *A.* or his representatives, for the money due on the mortgage, and declaring that the mortgage was kept on foot, merely to protect the title of *B.* and his heirs, in the premises. In an action of ejectment brought by *A.* and wife against a person claiming under *B.*, it was held, that the covenant endorsed on the mortgage was no satisfaction or discharge of the mortgage, in law or equity; but the mortgage being unredeemed, the title under it, set up by the defendant claiming under *B.*, was a good and valid defence. *Denn, ex dem. Demarest, v. Wynkoop*, 168

1. A new trial will not be granted on the ground of newly discovered evidence, which does not relate to new facts, but goes only to corroborate the testimony given at the former trial, or which consists merely of cumulative facts or circumstances relative to the same matter, controverted at the former trial. *Smith v. Brush and others*, 84

2. Though a verdict was against the weight of evidence; yet the action sounding in *tort*, being against a sheriff for an *escape*, and the sum in controversy small, and the evidence as to the damages contradictory, a new trial was refused. *Feeter v. Whipple*, 369

3. On a motion for a new trial, in an action of ejectment, on the ground of the discovery of new and material evidence, since the trial, the affidavits stated, that *C.* who claimed title to the land in the possession of *B* his tenant, had the care and management of the defence of the suit and was present at the trial; that *F.* was a witness at the trial; but that *C.* did not know, until after the trial,

I N D E X.

that *F.* knew or could testify the facts stated as material; though it appeared that *B.* the tenant, who was not present at the trial, did know before the trial, what *F.* could testify. A new trial was granted, as the evidence stated was material, and the suit being to change the possession of several years. *Jackson, ex dem. Gardner and others, v. Laird,* 489

NONSUIT.

In a joint action of *trespass* against three defendants; one of them suffered judgment to pass by default, and it was held that the other defendants could not obtain a judgment as in a case of nonsuit, for not proceeding to trial; as the plaintiff, in such case, cannot be nonsuited. *Yates v. Lansing and others,* 289

O

ONONDAGA COMMISSIONERS.

1. In cases of awards by the *Onondaga commissioners*, infants and others under legal disabilities at the time of the award, must file their *dissent* within three years after coming of age, or the removal of the disability, otherwise they will be barred. It is not sufficient to bring an action within the three years, without having filed a dissent. Whether the land was vacant, or not, the dissent is equally necessary in every case.

Jackson, ex dem. Cornelius and others, v. M'Kee, 429

2. An award of the *Onondaga commissioners*, under the act (sess. 20. c. 51) is final and conclusive, if no *dissent* has been filed, though the land was vacant, for five years after, and the party against whom the award was given, brought his action soon after possession was taken. *Jackson, ex dem. Robicheau and others, v. Swartwout,* 490

ORDERS OF REMOVAL.

See POOR.

P

PARTITION.

1. In a *petition for a partition*, under the statute, it is not necessary to set forth the rights and titles of the several tenants at large; nor is it necessary to allege the *seisin* of the ancestor or person from whom the parties derive title; but it is sufficient to state, in general terms, that each tenant was *seised* of his part or share in fee, or as the case may be, whether such *seisin* be acquired by descent or purchase. *Bradshaw v. Callaghan and Wife,* 458
2. A tenant in common of the inheritance, may maintain partition, notwithstanding a particular estate is outstanding. And where a partition was made among several heirs, as

I N D E X.

signing to each his portion of lands, by metes and bounds, but excepting from each portion one-third thereof, as the dower of the *widow* of the ancestor, it was held valid, *ib.*

3. The statute relative to partition does not extend to a tenant in dower; but the estate may, nevertheless, be divided among the other tenants; and a partition so made is good, though the dower of the widow is excepted and left undivided, *ib.*

4. A widow's dower, not being within the purview of the act, her rights cannot be affected, by the partition, nor is she liable for any part of the costs and expenses of making the partition. *Bradshaw v. Callaghan and Wife*, 558

PATENT.

See DE BRUYN'S PATENT. BAKER AND FLODDER'S PATENT. GRANT, 2.

PAYMENT.

1. The mere giving a bond for the debt of another, is no payment; and an action for money paid, laid out and expended for the use of the defendant, will not lie, unless the plaintiff has actually advanced money. *Cumming v. Hackley & Fisher*, 202

2. The giving a negotiable note may, in some cases, be equivalent to the payment of money; but the giving a bond is not such payment, *ib.*

3. Giving a promissory *note* is no payment of a *book* debt. It only suspends the right of action during the time allowed for payment by the note. And the note not having been paid, the plaintiff was held entitled to recover the amount of his book debt, with interest from the time the note was payable. *Putnam v. Lewis*, 389

PEDIGREE.

See EVIDENCE, 3, 4, 5.

PLEADINGS.

1. In an action of debt on recognisance of bail, the declaration laid the *venue* in *Greene* county, and stated that *S. F.* came into the Supreme Court, and "by the name of *S. F.* of *K.* in said county, farmer," became bail, &c. and the *bail-piece* offered in evidence was written, "*Delaware ss. I. H.* is delivered to bail to *S. F.* of the town of *K.* in said county, farmer," &c. and was taken before a judge of *Delaware* county common pleas; and the *recognisance roll* stated that "*S. F.* of the town of *K.* and county of *D.* farmer," came into court and became bail, &c., it was held that there was no material *variance* between the declaration and the *bail-piece* and *recognisance roll*, the description in the declaration being set out according to the sense, and not according to the tenor. *Rodman and others v. Forman*, 26

2. To a *sci. fa* on a judgment, the de-

I N D E X.

defendant cannot plead any matter which he might have pleaded to the original action, or which existed prior to the judgment; and it makes no difference whether the judgment was entered up by confession on a warrant of attorney, or by default, or on plea; but where the judgment is by confession, the proper remedy is by an application to the court for relief on motion. *M'Farland v. Irwin*, 77

3. *Nil debet* is not a good plea to an action of *debt on recognisance*, nor to any action founded on a *record* or *specialty*. But where the record or specialty is merely inducement to the action which is grounded on matter of fact, as in debt for *rent*, for an *escape*, or on a *devastavit*, there *nil debet* may be pleaded. *Bullis v. Giddens & Brown*, 82

4. Where a cause is removed from a court of common pleas into this court, by *habeas corpus*, the plaintiff may declare in this court for a different cause of action, and for a demand which has accrued subsequent to the commencement of the suit below, and prior to the removal of the cause into this court; and the defendant may, in like manner, plead or *set off* any demand which has accrued subsequent to bringing the action below, and prior to its removal to this court; but he cannot plead the *statute of limitations*, or *coverture*, or matter subsequently arising, that does not go to the merits of the plaintiff's demand. *Vosburgh v. Rogers*, 91

5. To say of a person, "he has sworn false," or "has taken a false oath," is not actionable; and the meaning of the words cannot be enlarged by an *innuendo*. Yet these words may be aided so as to support the declaration, if the defendant in his *plea* of justification, allege or confess that he spoke the words, by reason of a false oath taken by the plaintiff in a court of competent jurisdiction. But if the defendant plead the general issue, and give notice of his justification, the notice will not help the declaration, for it is not considered as a special plea, nor does it form any part of the record. *Vaughan v. Havens*, 109

6. In an action of debt, on a bond given for the *gaol liberties*, the suggestion of the breach generally, in the words of the condition, is sufficient, without alleging the particular damages; and the court adjudging the declaration on such a bond to be sufficient, the entry on the record was, that the judgment on the demurrer should be stayed, until the truth of the breach to be suggested should be ascertained, and the damages assessed; this was held to be correct within the statute, (sess. 24. c. 90. s. 7,) which is to receive a liberal and beneficial construction. The suggestion of breaches may be *before* a formal entry of judgment on demurrer, &c. *Smith and others v. Jansen*, 111

7. But where, in the final judgment, the Court of Common Pleas gave judg-

INDEX.

ment for the debt, and six cents costs, together with the damages assessed by the jury, and also the costs of suit adjudged of increase; this was held erroneous, and the judgment of the court below was reversed as to the sum assessed for damages, but suffered to stand good as to the debt and costs, including the costs of assessment; and neither party in this case was held to be entitled to costs, on the writ of error. *ib.*

8. In an action of *debt* on an arbitration bond, the defendant pleaded no award; and the plaintiff replied that the defendant revoked the submission, &c. but did not state that the *revocation* was under *seal*, the replication was held bad. *Van Antwerp v. Stewart,* 125

9. To a declaration against *A.* as executor of *B.*, the defendant pleaded in abatement that *B.* died intestate, and letters of administration were afterwards granted to the defendant, &c. The plaintiff replied that previous to granting the letters of administration, the executor made himself executor *de son tort*, &c. On demurrer the replication was held to be bad, and the declaration was quashed. *Rattoon and another v. Overacker, Administrator of Craig,* 126

10. *A.* gave a promissory note to *B.* payable in sixty days, and in consideration that *C.*, at the request of *A.*, would also sign the note as surety,

474

A. undertook and promised to take up the note when it became due, and to indemnify *C.* and save him *harmless* from all damages and costs, which he might sustain by reason of signing the note, &c. and *A.* did not take up the note, &c., but *C.* was sued by *B.* who recovered judgment against him, on which *C.* was taken in execution, and committed to prison. In an action of *assumpsit*, brought by *C.* against *A.*, the latter pleaded that *C.* was discharged from his imprisonment under the execution, by virtue of the act for the relief of debtors, &c. and had never paid the note, or the judgment against him, or any part thereof, &c. On demurrer, the plea was held bad, and that the plaintiff was entitled to recover on the promise to indemnify. *Powell v. Smith,* 249

11. A general replication to a special plea need not be signed by counsel. *Pumppell v. Crosby,* 322

12. *Double pleas* must be signed by counsel. *Satterlee v. Satterlee,* 327

13. *Pleas administrant*, singly pleaded, need not be signed by counsel; but if joined with the general issue, the plea is *double*, and must be signed by counsel, *ib.*

14. It is sufficient to state a promissory note, in the declaration, according to its terms. *Herrick v. Bennett,* 374

15. In an action of trespass *quare clau-*

I N D E X.

sum frigat, and for cutting and carrying away wheat, before a justice of the peace, the defendant pleaded a former suit by the plaintiff against him, for the wheat, in bar, and it was held good. The rule in this case depends, not on the identity of the action, but on the proof being the same in both cases. *Johnson v. Smith*, 383

16. In an action for *debet*, before a justice, a plea of a former suit by the defendant against the plaintiff on a *contract*, in which the present plaintiff neglected to set off his demand, is no bar. *Dean and another v. Allen*, 390

17. In an action of *debt* on an *award*, true copies of the bond and award were served, with the declaration, on the defendant's attorney; but the award set forth in the declaration varied from the *oyer*, and from that contained in the *nisi prius* record. The defendant pleaded no such award, and a verdict was found for the plaintiff. It was held, that if the defendant meant to avail himself of the *variance* between the award set forth in the declaration and the *oyer*, he should have demurred specially, instead of pleading no award; and that as the proof corresponded with the *nisi prius* record at the trial, the defendant was too late to take advantage of the variance, nor could the verdict be set aside, on the ground of surprise, as the *oyer* contained a

true copy of the award. *James v. Wakely*, 410

18. In an action of *assumpsit* against an administrator, the plaintiff in his declaration stated, that the promise was made by the intestate in his life-time, and by the defendant, "administrator as aforesaid," since the death of the intestate. The declaration was held sufficient, especially after verdict, it being tantamount to alleging that the promise was made by the defendant as *administrator*. *Carter v. Phelps's Administrator*, 440

19. A count on a promise made by an *executor* or *administrator*, as such, and for which he is not personally liable, may be joined with a count on a promise made by the testator or intestate; and whether the promises be in one and the same, or in separate counts, is immaterial. *ib.*

20. In an action for a libel, the defendant pleaded the general issue, with notice of special matter in justification, stating that he would give in evidence, at the trial, a record of a trial of indictment, before the general sessions, &c. of the term of *June*, 1810. The record produced was of a trial in the term of *June*, 1809; it was held that the variance was not material, and that the record was admissible in evidence. It would be admissible, even in a case of special pleading, and more so in case of a *notice* subjoined to the general issue, which

I N D E X.

is regarded with less strictness than a special plea. *Brooks v. Bemiss*, 455

21. In an action of debt against a sheriff, for the *escape* of *G.*, a prisoner in his custody on execution, at the suit of the plaintiff, the defendant pleaded, that on the 1st of *October*, 1810, *G.* escaped against the will of the defendant, and that he returned into gaol before the commencement of the plaintiff's suit, and continued in gaol until the 6th of *October*, 1810, when he presented his petition to the Court of Common Pleas, &c. and was discharged out of custody on the said execution, by order of the Court of Common Pleas, having full power and authority for that purpose, pursuant to the *act for the relief of debtors, with respect to the imprisonment of their persons*; (sess. 24. c. 66;) it was held, on general demurrer, that the plea was sufficient to show that the Court of Common Pleas had jurisdiction in the case, and that the discharge was a sufficient justification to the sheriff, who has no concern with the regularity of the proceedings before the court.

Cantillon v. Graves, 472

See ACTION, QUI TAM, 1. *SLAVE*, 1.
COVENANT, 4. *USURY*, 2.

PLEDGE.

See MORTGAGE.

POOR.

1. An *order* signed by two justices, to an
476

overseer of the poor, to provide for the maintenance of a pauper, under the 1st section of the act of the 24th of *March*, 1809, (sess. 32. c. 90,) is valid. And though such order does not recite that the justice and overseer inquired into the state and circumstances of the pauper, before giving the order, such an inquiry will be intended to have been made and implied from the order. The justice and overseer need not make the inquiry together, for the order is not to be their joint act. *Adams v. Supervisors of Columbia*, 323

2. Matters of *form*, in orders for the relief of paupers, are not to be overlooked; and the justice has a reasonable discretion, as to the nature and extent of the weekly allowance; and if the pauper be sick or wounded; medicines and the attendance of a physician, are a reasonable charge; but all the charges for maintaining the pauper must be adjusted and paid, in the first instance, by the overseers of the poor, who are responsible to the persons rendering the assistance, *ib.*

3. A *mandamus* will not lie, at the instance of the party, to compel the supervisors of the county to audit and pay the account of such charges. The supervisors are only to pay such accounts as have been adjusted and paid by the overseers, in pursuance of the justice's order. *Adams v. Supervisors of Columbia*, 323

4. An order of two justices of *A.* for the

I N D E X.

removal of a pauper, directed the constable to convey and transport him to the town of *W.*, being the place from whence he last came, and there deliver him to a constable of *W.*, who was required also to deliver him to the next constable, and so from constable to constable until the pauper should be transported to the place of his last legal settlement, if any he had, in the state. The pauper was delivered to a constable of *W.*, who transported and delivered him to a constable of *N.* The overseers of *N.* appealed to the general sessions from the order, who dismissed the appeal. It was held, that the *order* had no force beyond the town of *W.* to which the pauper was first sent; and as to every other place or purpose, was void for uncertainty; and that *N.* not being bound, by such an order, to receive the *pauper*, had no right of appeal, having acted in their own wrong. *The Overseers of Niskayuna v. The Overseers of Guilderland,*

412

POSSESSION.

1. The act of 22d of *March*, 1791, (*sess. 14. c. 42. s. 11.*) sometimes called the *Canaan act*, granted the lands only to those who were in possession in their own right, and not occupying in the right of another. Where *A.* bought land in *Canaan*, in 1783, and put *B.*, one of his sons, in immediate possession, and declared he had bought it for him, and afterwards died in 1789, leaving several children his heirs at law, and *B.* continued in possession of the land above twenty-seven years, but without having obtained a deed from his father; it was held that *B.* was in possession under his father, and not in his own right, or adversely to his father; and that the act of 1791 confirmed the right to the land in the heirs of *A.* generally, on whom the law cast the inheritance; and that the rest of the children of *A.* were entitled to their proportion of the land so occupied by *B.* *Jackson, ex dem. Bromley and others, v. Benjamin,* 101

5. Where paupers are to be sent out of the state, by virtue of the 7th section of the act, (*sess. 24. c. 184.*) the justices, in their order of removal, must designate the route by which the pauper is to be transported, and not leave it to the discretion of constables, who are mere ministerial officers, who cannot be allowed to take the pauper where they please, in search of his place of last legal settlement, *ib*

2. If the plaintiff seeks to avoid a deed on the ground of an adverse possession, at the time of its execution, such adverse possession must be clearly made out, by positive facts, and not be left to inference or conjecture. *Wickham, qui tam, &c. v. Conklin,* 220

POUGHKEEPSIE.

By the "act to vest certain powers in the freeholders of the village of

AE

477

I N D E X.

Poughkeepsie," passed the 8th April, 1801, (sess. 24. c. 182,) the trustees of the village had power to make a by-law to prevent the sale of meat, &c. for the consumption of the inhabitants, within certain prescribed limits, except at the public market-place; and an action may be maintained by the trustees, to recover the penalty given for every offence against such by-law. *Bush and others v. Seabury*, 418

cents, for value received by *B.* and his heirs, on demand, with interest until paid," the note was held to be void for want of a consideration. *Ten Eyck v. Vanderpoel*, 120

3. It was agreed between *A.* and *B.* that *B.* should give his promissory note to *A.* for a certain sum which *A.* alleged was due to him, for a mistake made on a settlement of accounts between them, a few years before, but which mistake was denied by *B.*, and that the note should be lodged in the hands of *C.*, and if *B.*, within sixty days, should exhibit proof to *C.*, from which *C.* should think *B.* ought not to pay the note, then it should be delivered to *B.*; otherwise it should belong to *A.*, and *B.* insisted on producing parol proof to *C.* which he refused to admit. In a suit against *B.* on the note, it was held that the defendant was not in default, and that his default, on the decision of *C.* against *B.* was a condition precedent to the validity and binding operation of the note. *Stow v. Wadley*, 124
4. An action of *assumpsit* was brought on a judgment obtained against the defendant, in *Maryland*, as endorser of a bill of exchange, and it appeared that the plaintiff had declared in the suit in *Maryland*, on a protest for *non-payment*, as well as for *non-acceptance* of the bill, and the cause was there tried by a jury, who found for the plaintiff, on which the judgment was rendered. It was held,

2. Where *A.* as administrator of *B.* deceased, gave a promissory note to *C.* by which he "promised to pay *C.* sixty-one dollars and seventy-two

INDEX.

that the question of reasonable notice or due diligence, was a question compounded of law and fact, and proper to be submitted to a jury; and having once been fairly litigated and decided, it was not again to be investigated, in an action brought in this state, on the judgment. *Taylor v. Bryden*, 173

5. Where separate suits are brought against the *maker* and *endorser* of a note, and separate judgments recovered, the plaintiff is entitled to the costs in each suit. The statute (*sess. 24. c. 90. s. 14*) does not apply to this case. *Austin v. Bemiss*, 356

6. It is sufficient to state a promissory note, in the declaration according to its terms. *Herrick v. Bennett*, 374

7. Where no time of payment is mentioned in a note, it is payable immediately, *ib.*

8. Where the holder of a note received part payment of the maker of the note, after it fell due, and before calling on the endorser, it was held that the endorser was discharged; and a promise by him to pay the note, made without knowledge of a demand on the maker, and due notice to the endorser, was not binding. *Crain v. Colwell*, 384

9. Giving a promissory note is no payment of a *book* debt. It only suspends the right of action during the time allowed for the payment, by the note, and the note not having been paid, the plaintiff was held entitled to recover the amount of his book debt, with interest from the time the note was payable. *Putnam v. Lewis*, 389

10. Where a bet was laid after the poll was closed, on the event of the election for governor, and the party gave his negotiable note for the amount of the bet, payable in thirty days, which was deposited with a stakeholder, and afterwards delivered to the winner, who endorsed it after it became due; it was held that the endorser took the note, subject to all the defence existing against it, in the hands of the original payee, and that the note being given for such a *wager*, was void. *Lansing v. Lansing*, 454

11. Where *A.* gave to *B.* a promissory note payable to *B.* or order, and at the same time made an endorsement on the note, that it was to be delivered to *B.* in consideration of a judgment against *C.* to be assigned to *A.* by *B.*, it was held, that the note was a promissory note, within the statute, and might be declared on as such, notwithstanding the endorsement, which was merely to show the consideration, and to operate as a notice to whoever should purchase the note; and that the delivery of the note was *prima facie* evidence of an assignment of the judgment. *Sanders v. Bacon*, 485

See SHERIFF, 3. EVIDENCE, 7.

INDEX

PRACTICE.

1. Where a writ of error is brought on a judgment in a court of *common pleas*, and no attorney is employed by the defendant in error, in this court, the service of the assignment of errors, and notice to join in error, must be served on him, personally, either by delivering the same to him, or leaving them at his dwelling-house, or in such other mode as the court might specially direct, under the circumstances of the case. *Clement v. Crossman*, 287

2. A service of the notice, by affixing it up in the clerk's office, is not sufficient, *ib.*

3. Though a party had not a regular notice in writing of a writ of error being brought, or of a judgment of reversal; yet if he was informed and sufficiently apprized of the pendency of the writ of error, to have pleaded in time, and of the judgment of reversal, by default, in season to have moved the court, at a former term, to set it aside, it is a *laches*, and the judgment will not be set aside, after a term has so intervened, *ib.*

4. A general replication to a special plea need not be signed by counsel. *Pumpelly v. Crosby*, 322

5. *Double pleas* must be signed by counsel. *Plene administravit* singly pleaded, need not be signed by coun-
sel; but if joined with the general issue, the plea is *double*, and must be signed by counsel. *Satterlee v. Satterlee*, 327

6. It is irregular to issue a second execution, until the first is returned. Though where an execution has issued unadvisedly, it may be withdrawn, before any thing is done upon it; yet where a sale has been made under an execution, and the sheriff died without executing a deed, it was held irregular to withdraw and suppress the execution, and issue a second to the new sheriff, for the purpose of selling the property a second time. Whether the sale on the first execution was *bona fide*, or fraudulent, the court will not decide, on motion. *Cairns v. Smith*, 337

7. In a suit against an *attorney*, of this court, the *bill* is in the nature of process, and must be served on him *personally*, or by some other service, which the court, under circumstances, may consider equivalent. Service on the agent of the attorney is not sufficient. *Backus v. Rogers*, 346

8. Whether after bail is put in, the arrest and proceeding may be set aside on motion for irregularity, must depend on the practice of the court. This court will not interfere with the proceedings of an inferior court in this respect. *In the matter of W. Livingston*, 351

INDEX.

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351

9. Where a rule to set aside a default and subsequent proceedings was granted *on payment of costs*, and the costs were regularly demanded of the defendant, but not paid, and the plaintiff, afterwards, issued an execution on the judgment, the court refused to set aside the execution. *Pugsley v. Van Aken*, 352

10. Where a rule is granted on payment of costs, it is conditional, and is of no force, unless the costs be paid *instante*: and the party who is to pay costs, must seek and tender them to the other party. *Pugsley v. Van Aken*, 352

11. Where a writ of error is brought to this court, on a judgment obtained in a court of common pleas; and the judgment below is affirmed; the attorney of the plaintiff in error is not bound to pay the costs in error, on the ground that before the judgment was obtained in the court below, the plaintiff had removed out of the state, and his attorney had not filed any security for the costs. The bringing of the writ of error is not the commencement of such a suit, as would render the attorney responsible for the costs; nor does the case come within the meaning of the 14th rule of *January* term, 1799, as to filing security for costs. *Frary v. Dakin*, 353

12. In an action of *trespass de bonis as- portatis*, the *venue* had been changed, on the usual affidavit of the defendant, from *Onondaga* county to *Saratoga*, where the trespass was committed; and the plaintiff afterwards applied to bring back the *venue* to the county of *Onondaga*, on the ground, that he had two or more material witnesses residing in that county; but the court refused to grant the motion, unless the plaintiff would stipulate to give material evidence arising in the county of *Onondaga*. *Ross v. Lown*, 354

13. Where separate suits are brought against the *maker* and *endorser* of a note, and separate judgments recovered, the plaintiff is entitled to the *costs* in each suit. The statute (sess. 24. c. 90. s. 14) does not apply to this case. *Austin v. Bemiss*, 355

14. The plaintiff is entitled to two real and substantial persons, as special bail; but if one real and one fictitious person be put in as special bail, the plaintiff cannot treat the bail-piece as a nullity, and take an assignment of the bail-bond; but the proper course is to except to the sufficiency of the bail. *Caines v. Hunt*, 358

15. A defendant has twenty days after the last day of the second week of the term, within which to put in special bail. *Lane v. Cook*, 359

16. Service of a notice in vacation of a motion to be made in term, on the agent of the attorney in *Utica* is sufficient. *Chapman v. Raymond*, 360

INDEX.

17. Service of a notice on an attorney or his clerk, in his office at 10 o'clock in the evening, is good. *Cooper v. Carr,* 360

18. Where no attorney is employed by the defendant in error, the assignment of errors need not be served on the party; but only a notice to join in error. *Verney v. Benedict,* 360

See HABEAS CORPUS, 1. NONSUIT. COURT OF ERRORS.

R

RECEIPT.

A receipt in full of all demands, for a book debt, does not preclude the plaintiff from showing the circumstances under which it was given. *Putman v. Lewis,* 389

RELEASE.

Where *A.* and *B.* gave a sealed note to *C.*, and *A.* afterwards gave a bond and mortgage to *C.* for the amount due on the note, and *C.* covenanted to procure and cancel the note, it was held, that though the bond and mortgage were not an extinguishment of the note, yet the covenant made with *A.* was for the benefit of *A.* and *B.*, and a covenant not to sue, which amounted to a release of the note. *Phelps v. Johnson,* 54

S

SALE.

If a seller will not make an assurance when reasonably demanded, he loses the bargain, and the purchaser is not bound to wait until he is able to convey; and it seems, that after a continued neglect and inability of the seller for six years subsequent to a request and refusal to convey, neither a court of law nor equity would interfere to enforce the performance of the agreement. *Van Beekhoven v. Crapser,* 257

See SHERIFF, 8. EXECUTION, 4, 5. AUCTION. PLAUES, 4, 5.

SCIRE FACS.

To a *scire fachs*, on a judgment, the defendant cannot plead any matter which he might have pleaded to the original action, or which existed prior to the judgment; and it makes no difference whether the judgment was entered up by confession on a warrant of attorney, or by default, or on plea; but where the judgment is by confession, the proper remedy is by an application to the court for relief, on motion. *McFarland v. Irwin,* 77

SET-OFF.

1. Where an attorney of this court was sued in November, 1898, for twenty-

INDEX.

five dollars and ninety-three cents, and had a set-off of twenty dollars and twenty-five cents, and the plaintiff recovered five dollars and sixty-eight cents; it was held that the defendant was entitled to recover costs; but that the plaintiff might set off the amount he had recovered against so much of the costs. *Willett v. Starr*,

123

2. In an action of *assumpsit*, brought by *A.* against *B.*, the defendant may set off a *bond* given by *A.* to *C.* and assigned by *C.* to *B.* before the commencement of the suit. *Tuttle v. Bebee*, 152

3. Where the plaintiff in an action of *trespass quare clausum fregit*, &c. recovered less than fifty dollars damages; and the defendant recovered costs, the defendant's taxed costs were allowed to be set off against the damages recovered by the plaintiff who was insolvent. The *lien* of the plaintiff for his costs, in this case, extends only to the balance due, after deducting the defendant's charges, and does not affect the equitable right of set-off between the parties. *Porter v. Lane*, 357

bers, a member of that society is a competent witness, although the members hold all things in common, and have a partnership interest in all their concerns, as a religious society. *Wells v. Lane*, 455

See APPRENTICES.

SHERIFF.

1. Where the sheriff returns that he has a certain sum made, by virtue of the execution, ready to deliver to the party entitled, this is a sufficient evidence of a receipt of the money to charge him with the amount, though, in fact, no money was actually received by him. *Doty v. Turner, Sheriff of Rensselaer*, 20

2. Where a sheriff justifies under a *scier facias*, it is not necessary that he should show that it is returned, nor will the want of an endorsement on the execution, of the time it was received, by the sheriff, render it inadmissible in evidence: for the statute is merely directory to the sheriff, on this point: and the time of receiving it may be shown by *parol proof*, or otherwise. *Beals v. Guernsey*, 52

3. Where a deputy sheriff, instead of taking a bail-bond from *A.* whom he had arrested, took from him a negotiable note, made by *B.* which *A.* endorsed in blank to the deputy sheriff for his security; and the deputy sheriff afterwards brought an action, 483

SLAVERS.

In an action under the act (sess. 24. c. 188) concerning slaves, for a penalty, for harboring the slave of the plaintiff, brought against a member of a religious society, or sect, called *Sta-*

INDEX

1. as endorsee, against the maker of the note; it was held, that the assignment or transfer of the note to the deputy sheriff was illegal and void, being contrary to the statute; and that the maker might avail himself of this fact to defeat the action. *Strong v. Tompkins and another*, 93

2. An inquisition made by a sheriff's jury, to ascertain whether the property in goods, taken on a *fieri facias*, is in the defendant, or not, if found not to be in him, is a justification to the sheriff for returning *nulla bona*, and a conclusive defence in an action against him for a *false return*; unless it be shown that he did not act with good faith. *Bayley v. Bates, Sheriff, &c.* 185

3. But if an adequate indemnity is tendered to the sheriff, and he should unreasonably refuse it, *it seems* that he is bound to proceed and sell the goods, or be liable for a *false return*, *ib.*

4. *It seems*, that a special action on the case will not lie against a *gauler*, at the suit of the sheriff, for a negligent escape; but that the *gauler* is answerable to the sheriff only in an action of *assumpsit*, on his implied undertaking to serve the sheriff with diligence and fidelity. *Kain and others, Executors of Rhea, v. Ostrander*, 207

5. After an *escape* by the defendant from custody, on a *ca. sa.* the plain- 484

6. A purchaser at a sheriff's sale cannot be affected by any matter subsequent to the sale, arising between the parties to the judgment to which he is a stranger, *ib.*

7. Where a defendant had been surrendered by his bail, and was permitted by the sheriff to go at large within the liberties of the gaol, on giving security by bond according to the statute, and a *ca. sa.* at the suit of the plaintiff was afterwards delivered to the sheriff, who did not take a new bond, and the defendant on the next day went beyond the liberties; it was held, in an action for an escape, on the execution, that the mere delivery of the *ca. sa.* was not, *ipso facto, et eo instanti*, an arrest, so as to place the defendant in custody on execution, and that the sheriff was not liable. *Tracy and another v. Whipple*, 379

8. A seizure of lands by a sheriff, under a *fieri facias*, does not devest the estate of the debtor; nor does a sale at auction, by the sheriff, unless the purchase-money is paid, and a deed delivered. *Catlin v. Jackson ex dem Gratz, in error*, 520

9. Plaintiff may proceed against the sheriff for the *escape*, and at the same time take out a *fieri facias* against the property of the defendant, for the remedies are not inconsistent with each other. *Jackson, ex dem. M-Crea, v. Bartlett*, 361

INDEX.

11. A sheriff's sale of land is within the statute of frauds, *ib.*

12. Where a sheriff executed a deed for land sold by him at auction, under a *fi. fa.;* and delivered it to the attorney of the plaintiff, to be delivered to the grantee on the payment of the purchase-money, it was held that no estate passed by the deed, until the purchase-money was paid, or condition performed, *ib.*

13. A sheriff may deliver a deed, as *an escrow*; but the money must be paid at a day certain, and within a reasonable time, or the sale will be void; and what is reasonable time depends on circumstances; but it seems that it cannot extend beyond the return day of the *venditioni exponas*, or, at most, the next vacation. *Catlin v. Jackson, ex dein. Gratz*, in error, 520

in a particular suit, "F. knows nothing about the suit, he will lead you on until he has undone you," is not actionable, without alleging and proving special damage. *Foot v. Brown*, 64

2. In an action of *slander*, it is sufficient to prove the substance of the words laid in the declaration. Where the defendant said "my watch has been stolen in M.'s bar-room, and I have reason to believe that T. took it, and that her mother (M.) concealed it;" it was held that these words were actionable. *Miller v. M. Miller*, 74

3. Where the defendant in an action of slander, said his watch had been stolen, and that, "he had reason to believe that T. took it," it was held that this was a sufficient charge of a crime; and that the words were actionable. *Miller v. T. Miller*, 77

See EXECUTION, 1. 8, 9, 10. PLEADINGS, 21.

SHIP.

A *mortgagee* of a ship, *out of possession*, is not liable for repairs or necessities furnished the ship. *M'Intyre and Bradford v. Scott*, 159

See MASTER OF SHIP.

SLANDER.

1. To say of an *attorney* or counsellor

false," or "has taken a false oath," is not actionable; and the meaning of the words cannot be enlarged by *innuendo*; yet these words may be aided so as to support the declaration, if the defendant, in his *plea* of justification, allege or confess that he spoke the words by reason of a false oath taken by the plaintiff in a court of competent jurisdiction. But if the defendant plead the general issue, and give notice of his justification, the notice will not help the declaration, for it is not considered as a special plea, nor does it form any 485

I N D E X.

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| part of the record. <i>Vaughan v. Havers,</i> | 1764, May 12, sess. 7. c. 64. (Forfeited Estates,) 109 |
| SLAVE. | 1787, Feb. 8, sess. 10. c. 13. (Usury,) 218 |
| 1. In an action <i>qui tam</i> on the sixth section of the act concerning slaves (sess. 24. c. 188) it was held, that the <i>exception</i> in the clause was matter of excuse to the defendant, and need not be negatived by the plaintiff, in his declaration. <i>Hart, qui tam, v. Cleis,</i> 41 | 1788, Feb. 6, sess. 11. c. 6. (Forcible Entries, &c.) 44. 464 |
| 2. That part of the 6th section of this act, which declares that "the slave exported, or attempted to be exported, shall be free," does not operate, unless the master or owner is concerned in the exportation; but in case of a stranger, or third person, acting without the knowledge of the owner of the slave, the only penalty is the forfeiture of two hundred and fifty dollars, <i>ib.</i> | 1791, March 22, sess. 14. c. 42. (Canaan Lands,) 101 |
| <i>See SHAKERS.</i> | 1797, March 24, sess. 20. c. 51. (Onondaga Commissioners,) 490 |
| STATUTE. | — March 29, sess. 20. c. 52. (Claims on forfeited Estates,) 104 |
| Conveyances by statute pass no other or different right than that which the party before possessed. <i>Jackson, ex dem. Cooper and others, v. Cory,</i> 285 | 1798, Aug. 10, sess. 22. c. 8. (Jurisdiction of State,) 197 |
| STATUTES CONSTRUED, EXPLAINED OR CITED. | 1799, March 15, sess. 22. c. 30. (Western Turnpike,) 150 |
| 1779, Oct. 22, sess. 3. c. 25. (Forfeitures and Attainder,) 108 | 1801, Feb. 24, sess. 24. c. 13. (Apprentices,) 329. 462 |
| 486 | — Feb. 24, sess. 24. c. 13 (Habeas Corpus,) 341 |
| | — March 20, sess. 24. c. 25. (Sheriffs,) 100 |
| | — March 20, sess. 24. c. 34. (Immorality,) 297 |
| | — March 27, sess. 24. c. 78. (Towns, Justices, Constables,) 69 |
| | — March 30, sess. 34. c. 87. (Champtery and Maintenance,) 220. 47. |

I N D E X.

1801, *March 30, sess. 24. c. 90. (Amendment of Law,)* 111. 356

SUPERVISORS OF COUNTIES.

— *April 7, sess. 24. c. 165. (Ten pound Act,)* 409

1. A *mandamus* will not lie, at the instance of the party, to compel the supervisors of the county to audit and pay the account of charges, for the maintenance of a pauper. The supervisors are only to pay such accounts as have been adjusted and paid by the overseers, in pursuance of the justice's order. (*Sess. 32. c. 90.*) *Adams v. The Supervisors of Columbia,* 323

— *April 8, sess. 24. c. 180. (County Supervisors,)* 385. 422

2. *A.* in 1791 granted a lot of land to "the people of the county of *Otsego*," on which a court-house and gaol were built by the supervisors in 1792, and used by the county. In 1806, by an act of the legislature, the supervisors were authorized to sell the court-house and gaol with the lot of land on which they stood; and they accordingly sold the land to *B.* In an action of ejectment against *B.* it was held that the people of the county had no capacity to take by grant, and the deed was void. *Jackson ex dem. Cooper, v. Cory,* 385

— *sess. 24. c. 182. (Poughkeepsie,)* 418

3. The act of the legislature (*sess. 24. c. 180*) enabling supervisors of counties to take conveyances of land, applies only to conveyances made to the supervisors by name. The act of the legislature, in 1806, did not authorize the supervisors to sell any thing more than such right or title as they had, *ib.*

— *sess. 24. c. 184. (Poor,)* 412

— *sess. 24. c. 186. (Highways,)* 321

— *sess. 24. c. 188. (Slaves,)* 41

1806, *Feb. 21, sess. 29. c. 18. (Otsego Supervisors,)* 387

1808, *April 11, sess. 31. c. 204. (Ten pound Act,)* 409. 427. 459

— *sess. 31. c. 213. (Western Turnpike,)* 150

— *April 11, sess. 31. c. 218. (Gospel and School Lots,)* 342

1809, *March 24, sess. 32. c. 90. (Poor,)* 323

1810, *Feb. 17, sess. 33. c. 5. (Supervisors,)* 342

— *April 2, sess. 33. c. 121. (Militia,)* 157

STATUTE OF FRAUDS.

See FRAUD.

4. *A.* granted to the supervisors of the

487

INDEX.

county of *Oneida*, a parcel of land upon *trust*, that they should erect and build on one part of it, lying *east* of a certain street, a *court-house and gaol*, and that they should suffer that part lying *west* of the same street, to be appropriated for building a *church and school-house, for the use of the inhabitants of Rome*. It was held, that if the supervisors of the county were a *corporation*, they had no capacity to take and hold lands, as supervisors, for the use of the inhabitants of *Rome*, or for any other use or purpose than that of the county which they represented. *Jackson, ex dem. Lynch, v. Hartwell*, 422

5. The supervisors of a county are a corporation, with special powers, and for special purposes; and it is very questionable whether, prior to the act passed 8th April, 1801, (sess. 24. c. 180,) they were competent to take a grant of land, *ib.*

SURETY.

A surety, *qua* surety, cannot call on his principal at law, until he has actually paid the money. And where no promise to indemnify was proved, nor the payment of any money by the surety, though he had been sued and charged in execution for the debt of the principal, but afterwards discharged under the insolvent act, he was held not entitled to recover in an action against the principal. *Powell v. Smith*, 249

SURRENDER.

See LEASE. 2

T

TENANTS IN COMMON.

If one of two tenants in common brings an action of trespass, the omission to join the other can only be taken advantage of by a *plea in abatement*. *Bradish v. Schenck*, 151

TENANT BY THE CURTESY.

1. Where a *feme covert* is the owner of wild and uncultivated land, she is considered in law, as in fact, possessed, so as to enable her husband to become a *tenant by the curtesy*. *Jackson, ex dem. Beekman, v. Sellick*, 262

2. An actual entry or *pedis possessio* by the wife or husband, during the *coverture*, is not requisite to the completion of a tenancy by the curtesy, *ib.*

3. Lands descended to *A*, a *feme covert*, who had a daughter, *C*, born in 1756. *A* died in 1764, and *B*, her husband died in 1784. *C*, the daughter, married *D* in 1783. An adverse possession was taken of the land in 1772, it being then vacant and uncultivated; and *C*, after the death of her husband in 1807, brought an action of *ejectment*; it was held that

I N D E X.

B. being a tenant by the courtesy, no right of entry accrued to *C.* until after the death of *B.* in 1784, and that *C.* being then a *feme covert*, was not bound to bring her action in twenty years thereafter, but was protected by the statute during her coverture. *Jackson, ex dem. Beekman, v. Sellick,*

262

ment, a tender to the person who is to receive is sufficient. *ib.*

3. Such a tender and refusal are a complete bar to the suit on the contract; and the plaintiff must resort to the person in whose possession the goods are, and who holds them as his bailee, and at his risk. *ib*

See Covenant, 3.

TENDER.

1. *A* having distrained the goods of *B.*, to wit, *horses* and household furniture, for rent, *C.* promised to deliver the goods to *A.*, in six days, or pay four hundred and fifty dollars, and the goods were left in the possession of *C.*. *A.* demanded the goods within the six days, but did not designate any place at which they were to be delivered, and immediately after, and within the six days, went with *C.* to the house of *B.* where the goods were; and *C.* then tendered the goods to *A.* who said that he was not ready to receive them, but that if *C.* would carry the goods to *D.*, *A.* would receive them, but *C.* refused to do so. In an action of *assumpsit*, by *A.* against *C.*, it was held, that the reply of *A.* to the offer of *C.* to deliver the goods to *A.* at *B.*'s house, dispensed with any further tender or delivery on the part of *C.*, especially as the articles were bulky and numerous. *Slingerland v. Morse,* 474

2. There is a difference in regard to tender, between things portable and things ponderous. If no place be appointed for performance or pay-

VOL. VIII.

TOLL.

See TURNPIKE ACTS.

TRESPASS.

1. Letting land upon shares, for a single crop, does not amount to a lease of the land, and the owner alone can bring *trespass*. *Bradish v. Schenck,* 151

2. If one of two tenants in common brings an action of *trespass*, the omission to join the other can only be taken advantage of by a plea in abatement. *ib.*

3. Where a *trespass* is committed on lands reserved by the state for the support of the gospel and schools, or on lands belonging to the state, the suit must be brought in the name of the *overseers of the poor* of the town in which the *trespass* is committed, in order to entitle the plaintiff to recover *treble damages*, under the act

62

489

INDEX.

of the 25th of April, 1805. (Sess. 28. c. 94.) If the suit is brought by the *supervisors*, under the act of the 5th February, 1810, (sess. 33. c. 5,) or the act passed the 11th of April, 1808, (sess. 31. c. 18,) the plaintiff is not entitled to *treble damages*. In order to recover *treble damages*, in cases where the party is entitled to them, the declaration of the plaintiff should refer to the act, that the defendant may be apprized of the extent of his demand, and the jury must find him guilty of the trespass alleged, and assess the *single* value of the timber or trees cut, and this finding of the jury must be endorsed on the *postea*, on the return of which the court will, on motion, *treble* the damages. *Newcomb v. Butterfield*, 342

4. A person cannot maintain *trespass* for goods, unless he has *actual* or *constructive possession* at the time. He must have, at least, such a right as to be entitled to reduce the goods to his possession when he pleases. *Putnam v. Wyley*, 482

5. Where *A.* delivered to *B.* a number of cows and sheep which *B.* promised to re-deliver, within one year with the natural increase, and to pay for such as should be lost or destroyed, and not re-delivered; this was held a letting of the chattels, for a year, for a valuable consideration, and not a naked bailment, and that *A.* could not maintain *trespass* against a person who took them out of the possession of *B.* ib.

490

See PLEADINGS, 15. *INTEREST*.

NONSUITE.

TROVER.

In an action of *trover*, proof that the defendant promised to return the goods to the plaintiff, and that he had not returned them, is sufficient evidence of a conversion; and a previous demand and refusal need not be proved. *Durell v. Mosher*, 445

See INTEREST.

TURNPIKE ACTS.

Under the act, (sess. 22. c. 39. s. 11,) and the act, (sess. 31. c. 213,) a person is exempt from paying *toll*, on the first great western turnpike, when going to mill in a town different from that in which he resides, if it appears that he usually went to such mill, when there was no grinding in his own town, and that he went for no other purpose than to have his corn ground. *Chestney v. Coon*, 150

U

USURY.

1. In an action of debt on a bond, where the defendant pleaded *usury*, which was alleged to consist in including in the bond one hundred and eighty-three dollars and seventy-two cents, for forbearance of payment; and it appeared that the plaintiff was to deliver to the defendant a horse of the value of one hundred dollars, and

INDEX.

which made part of the sum of one hundred and eighty-three dollars and seventy-two cents. It was held, that the evidence of the usury, given at the trial, varied from what was alleged in the pleadings, and that any variance in the sum, alleged to be usurious, or in the consideration, stated to be given for the forbearance, was fatal to the plea, and that such evidence ought to be rejected. Whether usury or not, is a question of fact for the jury to decide. *Smith v. Bush*, 84

2. In an action by a *common informer*, on the 2d section of the *act to prevent usury*, (sess. 10. c. 13,) the plaintiff must declare especially, and state the usury, &c. The general form of declaring mentioned in the act, is given only to the *borrower*. *Morrell, quantum, v. Fuller*, 218

V

VARIANCE.

1. In an action of debt on recognisance of bail, the declaration laid the *venue* in *Greene* county, and stated that *S. F.* came into the Supreme Court, and "by the name of *S. F.* of *K.* in the said county, farmer," became bail, &c. and the *bail-piece* offered was written, "Delaware ss. *L. H.* is delivered to bail to *S. F.* of the town of *K.* in said county, farmer," &c. and was taken before a judge of *Delaware* county common pleas; and the *recognisance roll* stated that " *S. F.* of the town of *K.* and county of *D.* farmer," came into court and

became bail, &c., it was held that there was no material *variance* between the declaration and the *bail-piece* and *recognisance roll*, the description in the declaration being set out according to the sense, and not according to the tenor. *Rodman and others v. Forman, administrator of Forman*, 26

2. Where the plaintiff declared on a contract by which the defendant agreed to pay him a certain sum, for *half* the land taken for a certain road; and the contract proved at the trial was, that the defendant was to pay for *all* the land, the variance was held fatal. *Crawford v. Morrell*, 253

3. In an action of *debt* on an *award*, true copies of the award were served, with the declaration, on the defendant's attorney; but the award set forth in the declaration varied from the *oyer*, and from that contained in the *mis prius* record. The defendant pleaded no such award, and a verdict was found for the plaintiff. It was held that if the defendant meant to avail himself of the *variance* between the declaration and the *oyer*, he should have demurred specially, instead of pleading no award; and that, as the proof corresponded with the *mis prius* record, at the trial, the defendant was too late to take advantage of the variance, nor could the verdict be set aside, on the ground of surprise, as the *oyer* contained a true copy of the award. *James v. Walruth*, 410

See *USURY*, 1. *PLEADINGS*, 20.

I N D E X.

VENUE.

In an action of *trespass de bonis asportatis* the *venue* had been changed, on the usual affidavit, from *Onondaga* county to *Saratoga*, where the trespass was committed; and the plaintiff afterwards applied to bring back the *venue* to the county of *Onondaga*, on the ground that he had two or more material witnesses residing in that county; but the court refused to grant the motion, unless the plaintiff would *stipulate* to give material evidence arising in the county of *Onondaga*. *Ross v. Lown*,

354

3. Where a bet was laid after the poll was closed, on the event of the election for governor, and the party gave his negotiable note for the amount of the bet, payable in thirty days, which was deposited with a stakeholder, and afterwards delivered to the winner who endorsed it after it became due; it was held that the endorser took the note, subject to all the defence existing against it, in the hands of the original payee, and that the note being given for such a *wager*, was void. *Lansing v. Lansing*, 454

WITNESS.

W

WAGER.

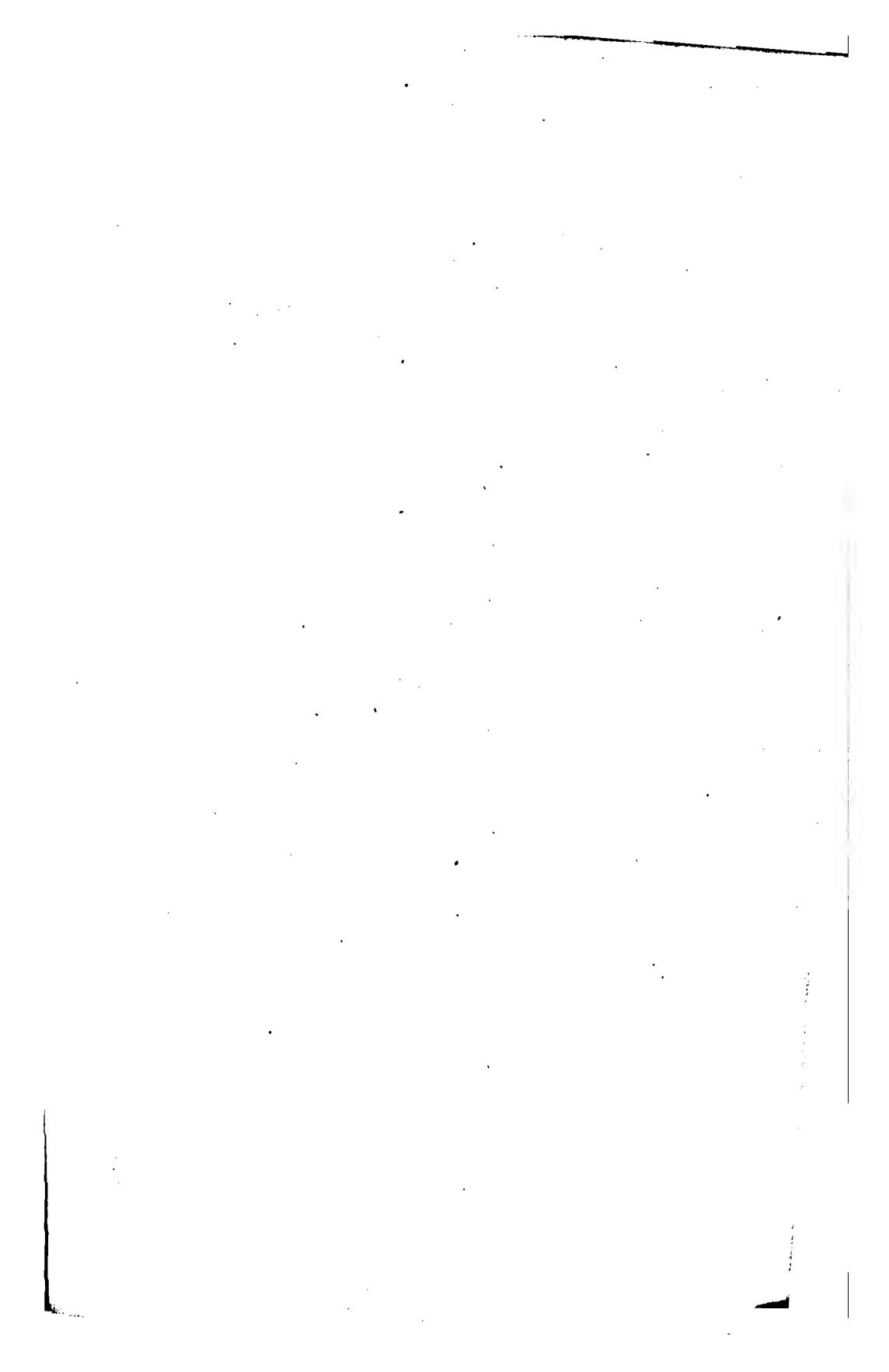
1. Where a *wager* or *bet* is lost, and the money or property has been fairly paid or delivered, the court will not help the plaintiff. *M'Cullum v. Gourlay*, 147
2. Where *A.* delivered to *B.* two firkins of butter, and agreed that if *P.* was elected governor of the state, *B.* should *pay* a certain price for the butter, otherwise, he was to pay nothing; and *P.* was not elected, it was held that *A.* had no right of action against *B.* for the butter. *M'Cullum v. Gourlay*, 147

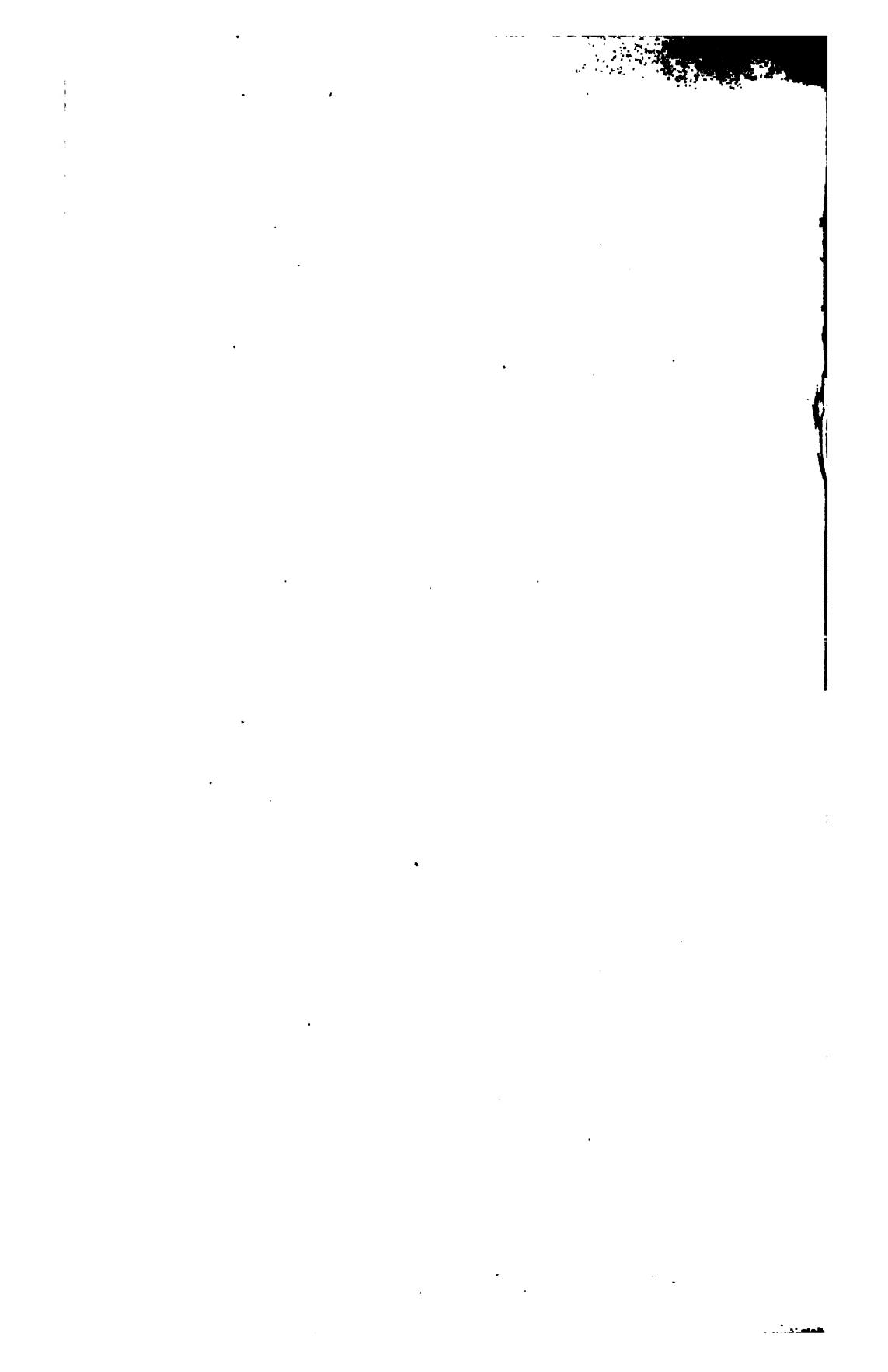
1. In an action of trespass for taking a heifer, the father of the defendant, and by whose order the trespass was committed, was held to be a competent witness for the defendant. *Atderman v. Tirrell*, 418

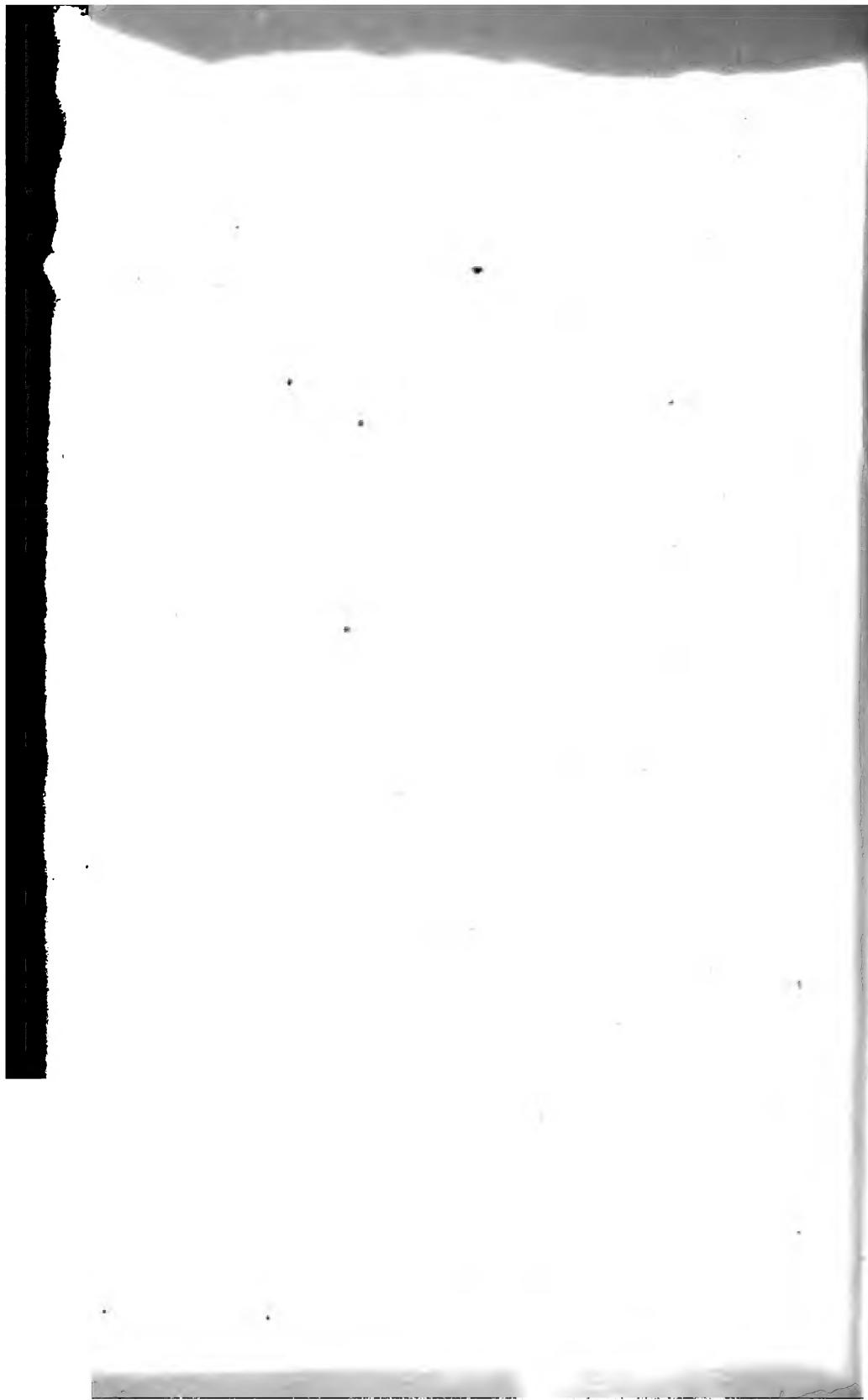
2. Where the witness declares, on his *voire dire*, that he is interested in favor of the party calling him, and that interest is so circumstanced that he cannot be released, the witness ought not to be sworn, though, in strictness, he is not interested; but if his supposed interest is against the party calling him he ought to be admitted. *The Trustees of Lansingburg v. Willard*, 420

See EVIDENCE, 2. 12, 13. SHAKERS

END OF THE EIGHTH VOLUME.







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